Supreme Court, U.S.

931223 JAN 18 1994

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

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SOKAOGON CHIPPEWA COMMUNITY,

Petitioner,

vs.

EXXON CORPORATION, a corporation chartered in the State of New Jersey; STATE OF WISCONSIN; FOREST COUNTY, a political subdivision of the State of Wisconsin; LANGLADE COUNTY, a political subdivision of the State of Wisconsin; and ONEIDA COUNTY, a political subdivision of the State of Wisconsin,

Respondents.

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a federal court ignore express language in an Indian treaty declaring that the payment of annuities was consideration and payment for the cession of Minnesota lands, and instead grant summary judgment construing a tribe's acceptance of such annuities as an implied acceptance of the extinguishment of reserved occupancy rights on Wisconsin lands nowhere mentioned in the treaty?

2. May a federal court grant summary judgment to a movant claiming an implied extinguishment of a treaty-reserved right of Indian occupancy, where the implication is drawn from a later treaty in which the affected tribe is not mentioned, where there is documentary evidence of the affected tribe's understanding of the later treaty as leaving them unprovided for, and where the affected tribe never gained the benefit of a reservation home enjoyed by the signatory tribes to the later treaty?

LIST OF PARTIES

The parties to this action are the Sokaogon Chippewa Community, the Exxon Corporation, and Forest, Langlade and Oneida Counties, political subdivisions of the State of Wisconsin. The State of Wisconsin, which was a party defendant in the district court and has been listed in the caption, was dismissed by the district court on Eleventh Amendment grounds, which portion of the judgment was not appealed, and therefore is not considered by the petitioner to be a party to this petition.

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For The Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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The petitioner Sokaogon Chippewa Community, a federally recognized Indian tribe, respectfully requests that a writ of certiorari issue to review the August 12, 1993 decision and judgment of the Seventh Circuit Court of Appeals, in *Sokaogon Chippewa Community v. Exxon Corp., "Sokaogon 3,"* 2 F.3d 219 (7th Cir. 1993), together with the order of the same court, entered on October 20, 1993, A.16, denying Sokaogon's petition for rehearing filed on August 26, 1993.

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OPINIONS BELOW

The District Court granted the respondents' motions for summary judgment on September 29, 1992 and entered judgment accordingly on September 30, 1992. The decision held that the Sokaogon's occupancy rights in Wisconsin, expressly reserved under an 1842 treaty with the Chippewa, were extinguished by an 1854 treaty which established reservations in Wisconsin but which left the Sokaogon without a reservation home. A.17-84; *Sokaogon Chippewa Community v. Exxon Corp., "Sokaogon 2,"* 805 F.Supp. 680 (E.D. Wis. 1992).

On appeal the Seventh Circuit Court of Appeals affirmed the summary judgment, holding that by accepting annuity payments under the later treaty, the Sokaogon must have accepted the extinguishment of their Wisconsin occupancy rights as the *quid pro quo.* A.12; *Sokaogon 3*, 2 F.3d at 225. A petition for rehearing, premised on the appellate panel's misreading of the express language of the treaty, was denied without opinion in an order entered October 20, 1993. A.16.

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JURISDICTION

The Seventh Circuit judgment for which review is sought was entered on August 12, 1993, A.15, followed by the filing of a petition for rehearing on August 26, 1993, and the entry of an order denying the petition on October 20, 1993. A.16. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sections 1254 and 2101(c).

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TREATY PROVISIONS INVOLVED

Treaty with the Chippewa, October 4, 1842, 7 Stat 591:

> ARTICLE I. The Chippewa Indians of the Mississippi and Lake Superior, cede to the United States all the country within the following boundaries; viz: beginning at the mouth of the Chocolate river of Lake Superior . . . [there follows a metes and bounds description of lands situated in northern Wisconsin and the Upper Peninsula of Michigan, shown on appended Map as Cession of 1842, A.85].
>
> ARTICLE II. The Indians stipulate for the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President of the United States, and that the laws of the United States shall be continued in force, in respect to their trade and intercourse with the whites, until otherwise ordered by Congress.

Treaty with the Chippewa, September 30, 1854, 10 Stat. 1109:

> ARTICLE I. The Chippewas of Lake Superior hereby cede to the United States all of the lands heretofore owned by them in common with the Chippewas of the Mississippi, lying east of the following boundary line . . . [there follows a metes and bounds description of lands lying entirely in the State of Minnesota, shown on appended Map as Cession of 1854, A.85].

ARTICLE 2. The United States agree to set apart and withhold from sale, for the use of the Chippewas of Lake Superior, the following described tracts of land, viz:

2d. For the La Pointe band, and such other Indians as may see fit to settle with them, a tract of land bounded as follows: Beginning on the south shore of Lake Superior, a few miles west of Montreal River . . . [there follows a metes and bounds description].

3d. For the other Wisconsin bands, a tract of land lying about Lac De Flambeau, and another tract on Lac Court Orielles, each equal in extent to three townships, the boundaries of which shall be hereafter agreed upon or fixed under the direction of the President.

6th. The Ontonagon band and that subdivision of the LaPointe band of which Buffalo is chief, may each select, on or near the lake shore, four sections of land, under the direction of the President, the boundaries of which shall be defined hereafter.

ARTICLE 4. In consideration of and payment for the country hereby ceded, the United States hereby agree to pay to the Chippewas of Lake Superior, annually, for the term of twenty years, the following sum, towit, five thousand dollars in coin, eight thousand dollars in goods, . . . etc. [there follows an extended description of goods and services].

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STATEMENT OF THE CASE

Historical Background

The petitioner Sokaogon Chippewa Community (hereafter "Sokaogon"), was signatory, *sub nom.* "Lake Bands," to the 1842 treaty under which the Chippewa ceded their remaining northern Wisconsin lands.[1] In Article II of the treaty the Chippewa, including the Sokaogon, reserved the "right of hunting," and "the other usual privileges of occupancy," until "required to remove by the President of the United States." Article II, 7 Stat. 591.

In a subsequent 1854 treaty, the Lake Superior Chippewa ceded their remaining Minnesota lands, receiving in exchange annuities specifically designated as compensation for the cession. Articles 1 and 4, 10 Stat. 1109. In Article 2 of the treaty the United States also agreed to reserve four reservations in Northern Wisconsin: (1) "For the LaPointe band, and such other Indians as may see fit to settle with them, a tract of land [described by metes and bounds];" (2) For "that subdivision of the LaPointe band of which Buffalo is the chief," four sections of land, to be selected "on or near the lake shore;" (3) "For the other Wisconsin bands, a tract of land lying about Lac De Flambeau, and another tract on Lac Court Orielles, each equal in extent to three townships . . . "

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[1] In the Nineteenth Century the Band was referred to under several names, including the "Post Lake Band," which refers to the general area of their villages and the site at issue here. For purposes of consistency their modern name, the Sokaogon, is used throughout the text.

The LaPointe Band, the "Lac Court Oreille Band" and the "Lac Du Flambeau Band" are the only Wisconsin bands listed as signatories to the 1854 treaty. The Sokaogon are not. Two of their chiefs, however, are listed under the Lac du Flambeau Band. A.3-4; *Sokaogan 3*, 2 F.3d at 221.

The reservations called for in the treaty were surveyed and delimited and the respective bands were established on them: the LaPointe Band, *sub nom.* the "Bad River Band," on a reservation of that name near Ashland, Wisconsin; the subdivision of the LaPointe Band, *sub nom.* the Red Cliff band, on a reservation of that name on Lake Superior; and the Lac Courte Oreilles and Lac du Flambeau Bands on the respective tracts identified by those names in the treaty.

The Sokaogon were never established on a reservation under the 1854 treaty. At the first annuity distribution under the new treaty a Sokaogon chief remonstrated with the Commissioner of Indian Affairs over the failure of the treaty to provide a reservation, and the two conferred in private thereafter. A.5-6; *Sokaogon 3*, 2 F.3d at 222. Petitions of the Sokaogon chiefs followed, selecting sites in the general area of Post Lake for a reservation. Id. After a generation of such petitions and entreaties, however, no reservation had been established; and the Sokaogon became the "Lost Band," bereft of a reservation or federal notice, except for occasional reports.

The *Lac Courte Oreilles* Litigation

In 1983 the Seventh Circuit reversed a district court ruling and upheld the surviving 1842 treaty right of another Lake Superior Chippewa Band, the Lac Courte

Oreilles, to hunt and fish on the Wisconsin lands ceded in that treaty. *Lac Courte Oreilles Band v. Voigt*, 700 F.2d 341 (7th Cir. 1983) *cert. denied* 464 U.S. 805 (1983) reversing the decision *sub nom. United States v. Bouchard*, 464 F.Supp. 1316 (W.D. Wis. 1978).

The district court had held that the establishment of a reservation for the Lac Courte Oreilles under the 1854 treaty impliedly extinguished their 1842 rights of occupancy. *United States v. Bouchard*, 464 F.Supp. at 1352. Reversing, the Seventh Circuit divided the right of occupancy into a "usufructuary" component, the right to hunt, fish and gather, and a right of occupancy *per se*. Assuming, but not deciding, the correctness of the District Court's conclusion that establishment of a reservation for the Lac Courte Oreilles Band impliedly extinguished their right of occupancy *per se*, 700 F.2d at 362 n.12, the court was unwilling to infer an implied extinguishment of the Band's usufructuary rights.[2] *Lac Courte Oreilles Band v. Voigt*, 700 F.2d at 365.

The Present Litigation

In June, 1986 the Sokaogon initiated the present action in the District Court for the Eastern District of Wisconsin. As amended, the Sokaogon complaint invoked federal question jurisdiction under 28 U.S.C. Sections 1331 and 1362, for claims arising under the Treaty with the Chippewa of 1842, 7 Stat. 591, the Treaty with the

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[2] The present case deals solely with the right of occupancy. Usufructuary rights are not in issue.

Chippewa of 1854, 10 Stat. 1109, and the Non-Intercourse Act, 25 U.S.C. 177.

The amended complaint's first claim for relief claims that the Band's 1842 treaty right of occupancy survives unextinguished, and seeks enforcement of the right against the Exxon Corporation, the State of Wisconsin and three counties, major landholders in the area traditionally inhabited by the Sokaogon. As a second claim for relief the complaint claimed that federal actions respecting the delimiting of a reservation for the Sokaogon acknowledged the intent of the 1854 treaty that they be provided with a reservation of their own; and in a third claim the amended complaint asserted that the United States would be liable to the extent the earlier claims were lost as a result of federal mis- or nonfeasance.

The District Court dismissed the third claim against the United States as time barred; and, raising the issue of federal indispensability *sua sponte*, the court dismissed the remaining defendants as well. Upon appeal the Seventh Circuit upheld the dismissal of the federal defendants, but reversed the ruling that the United States was indispensable to the remaining claims. *Sokaogon Chippewa Community v. State of Wisconsin, "Sokaogon 1, "* 879 F.2d 300 (7th Cir. 1989).

Upon remand Exxon, joined by the State and county defendants, moved for summary judgment on the first and second claims. In response, Sokaogon withdrew the second claim, conceding that the totality of the evidence would not support the conclusion that a reservation for the Sokaogon had actually been delimited and agreed upon in the Post Lake area. On the first claim, the survival of the 1842 occupancy rights, Sokaogon resisted summary judgment. Following the reasoning of *Bouchard* and *Lac Courte Oreilles Band,* Sokaogon agreed that establishment of a reservation home for a Chippewa Band under the 1854 treaty would be understood as extinguishing the Band's right of occupancy *per se* on the ceded territory. But, Sokaogon contended, unlike the Lac Courte Oreilles and other Chippewa bands who were expressly recognized as signatory in the treaty, the Sokaogon had never received a reservation under the 1854 treaty. And, again following the reasoning of *Bouchard,* Sokaogon contended that the 1854 treaty was not intended to leave the Chippewa as trespassers; therefore, Sokaogon contended, the 1842 right of occupancy *per se* was not to be deemed extinguished *until* the band was actually established on its treaty reservation.

In contending for summary judgment on the 1842 claim Exxon advanced the theory that the reservations set aside at Lac Courte Oreilles and Lac du Flambeau were residual, catchall reservations, intended to hold any and all Wisconsin bands, including the Sokaogon. In contradiction of this theory Sokaogon submitted documentation of their contemporaneous understanding of the 1854 treaty as leaving them unprovided with a home on the named reservations,[3] and in need of a reservation in the Post Lake vicinity.

On September 29, 1992 the District Court entered its Decision and Order, granting the defendants' motions.

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[3] For description see A.5-6; *Sokaogon 3,* 2 F.3d at 222.

A.17; *Sokaogon 2,* 805 F.Supp. 680 (E.D. Wis. 1992). The heart of the decision is the court's acceptance of the "residual reservation" theory.

> The LCO Band established itself at the reservation near Lac Courte Oreilles, and their occupancy rights were extinguished when the reservation's boundaries were set. Even though the Post Lake Band never relocated to any of the 1854 Treaty reservations, their occupancy rights must have been extinguished when the boundaries of the last unsurveyed reservation were finalized.

A.63; 805 F.Supp. at 703. The decision nowhere mentions the documentary evidence of the Sokaogon's contemporaneous understanding of the 1854 treaty as *not* providing them with a reservation home.

In an August 12, 1993 decision on appeal, the Seventh Circuit affirmed the grant of summary judgment. Although noting Supreme Court decisions requiring that Indian treaties be interpreted in favor of the Indians and "as the Indians themselves would have done," A.10-11; *Sokaogon 3,* 2 F.3d at 224, the panel found Sokaogon's acceptance of annuities to be conclusive evidence of the extinguishment of their 1842 right of occupancy. A.12-13; *Sokaogon 3,* 2 F.3d at 225.

In their August 26, 1993 petition for rehearing the Sokaogon contended, *inter alia,* that the Court's interpretation of the annuity payments contradicted Article 4 of the 1854 treaty, which declared that the annuities were intended as payment for the cession of lands in that treaty, i.e., Minnesota lands. In its October 20, 1993 order the panel denied the petition, without opinion.

REASONS FOR GRANTING THE WRIT

I

The Seventh Circuit's Decision On The Implied Impact Of The 1854 Chippewa Treaty On Petitioner's Pre-Existing Treaty-Reserved Rights Is In Patent Conflict With Century-Old Principles Of Treaty Interpretation, Reaffirmed In The Modern Decisions Of This Court.

The petitioner Sokaogon claims rights of occupancy expressly reserved in an 1842 treaty to which it was a separate signatory party. It does not seek to have such treaty language broadened or extended – it seeks only to have it honored and enforced.

A second treaty, the 1854 treaty, nowhere mentions the occupancy rights reserved under the 1842 treaty, let alone prescribes their extinguishment. Any bearing the latter treaty may have is a matter of "inference from the fact that the treaty established Indian reservations and from the purpose reasonably ascribed to the treaty." A.10; *Sokaogon 3*, 2 F.3d at 224. The decision below embodies a uniform drawing of inferences in favor of the extinguishment of pre-existing treaty rights and in favor of the federal government's purposes. As such, the decision is in conflict with the fundamental teachings of this Court.

The foundation stone for this nation's jurisprudence on Indian treaties was set by Justice McLean, writing 160 years ago in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832):

> The language used in treaties with the Indians should never be construed to their prejudice . . . How the words of the treaty were understood by this unlettered people, rather

> than their critical meaning, should form the rule of construction.

31 U.S. (6 Pet.) at 582, McLean, J., concurring.

The Court's unbroken adherence to this doctrine was summarized 80 years later by this Court:

> But in the Government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years.

Choate v. Trapp, 224 U.S. 665, 675 (1912)

Though its rationales have since been further articulated and expanded, the McLean principle continues to provide the foundation for modern decisions which maintain the respect for Indian treaties as viable, enforceable acknowledgments of Indian rights.

The principle expresses and gives effect to the federal trust responsibility. "The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians. Thus, it is well-established that treaties should be construed liberally in favor of the Indians." *County of Oneida v. Oneida Indian Nation,* 470 U.S. 226, 247 (1985).

The principle embodies the fundamental contract principle that it is the intention of both parties, not one side, which should govern. "[I]t is the intention of the parties, and not solely that of the superior side, that must control any attempt to interpret the treaties. When Indians are involved, this Court has long given special meaning to this rule." *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 675 (1979).

And last, but not least, the principle serves to protect the national honor in its dealings with other nations and in particular with the Indian tribes. "While the power to abrogate [treaty] rights exists . . . 'the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.' " *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968). "[I]t has been the policy of the United States from the beginning to respect the Indian right of occupancy," and would require "plain and unambiguous action to deprive the [Indians] of the benefits of that policy." *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 345-46 (1941).

The Seventh Circuit decision below is in wholesale conflict with these principles and the decisions of this Court embodying them.

First, the decision below not only extends but deforms and contradicts the express terms of the 1854 treaty. It does so, not to *avoid* prejudice to the Indians, but to their direct prejudice, and in the interest of what the panel perceives to be the federal government's purposes. In affirming the District Court's dismissal the Court below provided the following interpretation of the 1854 treaty and the relative benefits and obligations it conferred on the parties:

> Yet not only did their [Sokaogon] chiefs sign, but the bands accepted the benefits of the treaty – or at least the annual payments stipulated in the treaty, which were a principal part of the consideration. This implies that they accepted the burdens of the treaty as well – for one cannot limit the enforcement of a contract to a provision which happens to benefit the plaintiff *– and thus that they surrendered their right of occupancy. Otherwise it would have been all take and no give.*

A.12-13; *Sokaogon 3,* 2 F.3d at 225 (emphasis added). Again, in stronger fashion:

> A trier of fact would not be permitted to indulge the speculation that Me-ge-see and Ne-gig signed the treaty for the heck of it, believing that the bands which they headed up could thereafter exclude white settlers while receiving an annuity from the federal government.

Id.

This interpretation is at patent variance with the express terms of the 1854 treaty. The 1854 treaty expressly declares that the annuities which the Sokaogon accepted are paid "[i]n consideration of and payment for the country hereby ceded." Article 4, 10 Stat. 1109. "The country hereby ceded" refers, not to an implied extinguishment of occupancy rights on Wisconsin lands, but to an express cession of Minnesota lands in Article 1 of the 1854 treaty. "The 'territory hereby ceded' in the 1854 treaty was territory in northern Minnesota which was wholly separate and distinct from that ceded in 1837 and 1842." *United States v. Bouchard, supra,* 464 F.Supp. at 1352. "[The 1854 treaty] does not, moreover, appear to cede any land in

Wisconsin - that land had been ceded by the 1842 treaty, in which the reservation of 'other privileges of occupancy' had appeared." A.10; *Sokaogon 3*, 2 F.3d at 224.

Only a rewriting of the terms of Article 1 and Article 4 of the 1854 treaty would allow ascribing to the Sokaogon the "all take and no give" position ascribed to the Tribe in the August 12th decision. The actual text flatly contradicts the conclusion drawn by the Court: that by accepting annuity payments under Article 4 the Tribe was obliged to surrender occupancy rights in Wisconsin nowhere mentioned nor demanded of them in the 1854 treaty.

The Seventh Circuit's rewriting does not serve to square or harmonize one portion of the text with another. It serves solely to endorse an inference and implement a purpose favorable to the federal party to the treaty. This skewed interpretation in favor of the "superior" party is precisely what the principles of Indian treaty interpretation are designed to prevent. *Washington v. Washington State Commercial Passenger Fishing Vessel Assn., supra,* 443 U.S. at 676.

Second, the Seventh Circuit decision fails to give effect to the Sokaogon's contemporaneously documented understanding of the 1854 treaty as leaving them "unprovided for." A.5-6; *Sokaogon 3*, 2 F.3d at 222. There were three Wisconsin bands signatory to the 1854 treaty, the LaPointe, the Lac Courte Oreilles and the Lac du Flambeau. For each a reservation was established on or in the immediate vicinity of their home villages. Indeed, in the case of the LaPointe Band, even a subdivision of the

Band was provided with a separate reservation. Treaty of 1854, Article 2, Clause 6.

The Sokaogon's contemporaneously documented understanding of the treaty represented a clear and natural reading of its terms. Each Wisconsin signatory band was provided with a reservation on its home ground, or drawn to its selection, and would not be required to remove from its home precincts. There was no reason for the Sokaogon to accede to a different and hostile mandate: that they must abandon their home villages and remove to another band's homeland, on pain of being rendered a trespasser, bereft of their former right of occupancy anywhere.

The documented record shows that they did not accede to or understand themselves to be bound by such an interpretation of the 1854 treaty, and raised the matter at the earliest opportunity, in direct council with the Commissioner of Indian Affairs. To override the historically documented understandings of the Indians, consistent with the terms of the treaty, does violence to the principles set out above.

Third, the Seventh Circuit has inserted a new condition for the survival of treaty rights of occupancy, viz., that the Indians be able to document their continued reliance and belief in the survival of those rights. Such gratuitous conditioning of a treaty right, if let stand, would not only eviscerate the principles set out above but would seriously modify the status of a treaty right itself.

In essence, the Seventh Circuit dismissed the evidence of the Indians' understanding of the 1854 treaty because the Sokaogon did not show evidence of their belief in the survival of the 1842 treaty rights:

> But neither do they [the documents] support the inference that the Post Lake bands retained their rights of occupancy despite the 1854 treaty.

A.12; 2 F.3d at 225. This introduces quite a different criterion into the analysis. Even if there is basis for the inference that the Post Lake Band was not provided with a reservation under the 1854 treaty, this, according to the court, is apparently insufficient to survive a motion for summary judgment. Sokaogon, in the eyes of the Court, was obliged to produce documentary evidence that it had explicitly claimed that its 1842 occupancy rights survived.

> [B]ut the Sokaogon have not presented an affidavit or other evidence from any qualified person who is willing to attest that the Post Lake bands did not think that the 1854 treaty extinguished their rights to occupy land outside Indian reservations.

Id.

> They seek to enforce their rights under the earlier treaty, and nowhere in the voluminous materials on which they rely is there any intimation of a claim to remain on the land *under the 1842 treaty.*

Id. (emphasis in original).

These demands for explicit statements concerning the Sokaogon's belief in the survival of their 1842 occupancy rights find no place in established principles of treaty law. The 1842 occupancy right is an expressly reserved treaty right, constituting a constitutionally protected property interest and subjecting the United States to a claim for compensation in case of its taking or abrogation. *Lac Courte Oreilles Band v. Voigt, supra,* 700 F.2d at 358. To place the burden on the Sokaogon to prove the survival of the right by producing documents or witnesses evincing their belief that it survived, is to fundamentally shift the burden imposed under the canons of this Court.

Under the canons of this Court, it is not the proponent of an expressly reserved treaty right who bears the burden of proving its survival; the burden is on the proponent of extinguishment, especially where that extinguishment is implied. *Menominee Tribe v. United States, supra,* 391 U.S. at 13; *United States v. Santa Fe Pacific R. Co., supra,* 314 U.S. at 345-46.

The appellate panel's demand for an explicit statement evidencing the Sokaogon's belief or claim in the survival of the 1842 right is in contradiction with the Seventh Circuit's own ruling in *Lac Courte Oreilles Band v. Voigt, supra,* where the district court had also demanded an explicit statement of the survival of the 1842 treaty rights in order to find that the rights survived:

> Had the parties intended the 1854 treaty to continue to preserve those rights in the lands ceded in 1837 and 1842, it is reasonable to believe that they would have made it explicit.

United States v. Bouchard, supra, 464 F.Supp. at 1359.

The Seventh Circuit firmly rejected this analysis:

> We disagree . . . The LCO band had ceded its territory pursuant to the two earlier treaties in which its reservations of usufructuary rights had been explicit. Omission of any reference to

> those rights in the 1854 treaty suggests that the LCO band believed their right to use ceded land for traditional pursuits to be secure and unaffected by the 1854 treaty.

700 F.2d at 363.

This reasoning applies *mutatis mutandis* to the present panel's demand for explicit statements of survival of 1842 rights.[4] Letting the panel's reasoning stand would open a significant wound to the structure of the law governing Indian treaty interpretation.

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[4] Had the federal government sought to forcibly remove the Sokaogon from their precincts, it would have been natural for them to have asserted their surviving right. But the United States did not seek to remove them. A.6; *Sokaogon* 3, 2 F.3d at 222.

> They wanted their own reservation and kept asking the U.S. government to establish one for them and meanwhile they continued to live where they had lived before the treaty was signed-namely, on the tract in dispute in this case.

A.5; *Sokaogon* 3, 2 F.3d at 222.

CONCLUSION

For the foregoing reasons we submit that the Seventh Circuit's disposition of the Sokaogon's 1842 treaty claim is in patent conflict with the principles and canons of this Court and merits review before this Court in the interest of clarifying and reaffirming those principles, as well as in the interest of preventing the injustice of denying these people a trial on their grievance. For these reasons we ask that the court grant its writ of certiorari.

Respectfully submitted,

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX

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In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 92-3920

SOKAOGON CHIPPEWA COMMUNITY,

Plaintiff-Appellant,

v.

EXXON CORPORATION, STATE OF WISCONSIN,
FOREST COUNTY, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 86 C 599 – **Robert W. Warren,** *Senior Judge.*

ARGUED MAY 10, 1993 – DECIDED AUGUST 12, 1993

Before POSNER and FLAUM, *Circuit Judges,* and WILL, *Senior District Judge.**

POSNER, *Circuit Judge.* The Sokaogon Chippewa Community, an Indian tribe, brought this suit in 1986 against the United States, Exxon Corporation, the State of Wisconsin, and various political subdivisions of the state, seeking a declaration that the tribe has the right to occupy a tract of 144 square miles in northeastern Wisconsin which contains potentially valuable mineral deposits. The jurisdiction of the federal district court was based on 28 U.S.C. § 1362, which gives the federal courts jurisdiction over suits by Indian tribes arising under treaties or other federal laws; the tribe's claim, as we shall see, is based on a treaty. The district judge dismissed the suit on the ground that the United States was entitled to get out of the case because the statute of limitations had run, and, the United States being an indispensable party, the suit could not proceed against the other defendants in its absence. We reversed in part, agreeing that the United States should be dismissed but not that it was an indispensable party; so the suit could continue against the other defendants. *Sokaogon Chippewa Community v. Wisconsin,* 879 F.2d 300 (7th Cir. 1989). On remand, the district judge dismissed the State of Wisconsin on Eleventh Amendment grounds that the Sokaogan do not contest and granted the remaining defendants' motion for summary judgment. *Sokaogan Chippewa Community v. Exxon Corp.,* 805 F. Supp. 680 (E.D. Wis. 1992).

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* Hon. Hubert L. Will, of the Northern District of Illinois, sitting by designation.

The Sokaogon base their claim on a treaty that the United States signed in 1842 with representatives of the Chippewa (Ojibwa) nation, of which the Sokaogon were and are a part, though they went at the time by a different name. 7 Stat. 591. In the treaty the Chippewa ceded a large amount of land, including the land in question in this case, to the United States, but reserved "the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President of the United States." We may assume (without however deciding, because the issue is in doubt) that the

1842 treaty entitles the Sokaogon to occupy the tract in question unless they surrendered their right of occupancy in a subsequent treaty that the United States signed with the Chippewa in 1854. 10 Stat. 1109. The district judge held that they had, and if he was right – more precisely, if there is no triable issue concerning the effect of the later treaty in eliminating the Sokaogon's right of occupancy – then summary judgment was properly granted for the defendants.

The 1854 treaty was between the United States and two separate Chippewa nations, the Lake Superior Chippewa and the Mississippi Chippewa, but we can confine our attention to the former because the Sokaogon are Lake Superior Shippewas and the land in question in this case had been ceded by the Lake Superior Chippewa in the 1842 treaty. The later treaty designates additional lands ceded to the United States, but most of its provisions are taken up with specifying the consideration for the cessions made by the Chippewa in both treaties. The main consideration specified is of two sorts, annual payments to the tribes in cash and kind (including beaver traps and blacksmiths) and the establishment of several small reservations at specified locations. Some of these reservations are earmarked for particular tribes (called "bands" in the treaty). One of the reservations, however, is "for the La Pointe band, *and such other Indians as may see fit to settle with them*" (emphasis added), while another, which is to consist of tracts abutting two lakes, Lac du Flambeau and Lac Court Oreilles, is "for the other Wisconsin bands." The treaty does not mention the "Post Lake" bands, two small offshoots of what the treaty elsewhere calls the "Lac Du Flambeau Band" of Wisconsin

Chippewas. This is a potentially significant omission because the Post Lake bands are the name by which the Sokoagon tribe was known at the time the treaty was signed.

The last paragraph states that the treaty has been signed by two U.S. commissioners and "the undersigned chiefs and headmen of the Chippewas of Lake Superior and the Mississippi." (There are also signatures by interpreters and witnesses.) The signatures (actually x's) of the Indians are grouped under the names of different bands – the La Pointe Band, the L'Anse Band, and so forth. Two of the bands listed in the signature section are the "Lac Court Oreille Band" and the "Lac Du Flambeau Band." Among the signatures grouped under the latter heading are "Me-gee-see" and "Ne-gig," the respective heads of the two Post Lake bands.

The defendants argue that the promise to create, abutting lakes Flambeau and Court Oreilles, a reservation "for the other Wisconsin bands" was in fact a promise to create separate reservations for the Lac du Flambeau and Lac Court Oreilles tribes; that the Post Lake bands were a part of the Lac du Flambeau tribe and therefore entitled to reside in the reservation created for that tribe; but that if the Post Lake bands wanted to live in a different reservation they could always go to live in the one for the La Pointe tribe, since that reservation was expressly "for the La Pointe band, and such other Indians as may see fit to settle with them." At the time there were no more than about 200 Post Lake Indians (today there are about 1300 Sokaogon Indians), and it would have been odd to create a separate reservation for so small a community.

The reservations specified in the treaty were in fact created, and the land at issue in this case does not fall within the boundaries of any of them. The Post Lake bands signified their acceptance of the treaty not only by the signatures of their chiefs but also by accepting the annuities which the government paid them, as promised in the treaty, along with the other Chippewa tribes. The Post Lake bands did not, however, actually move to any of the reservations created by the 1854 treaty. They wanted their own reservation and kept asking the U.S. government to establish one for them and meanwhile they continued to live where they had lived before the treaty was signed – namely, on the tract in dispute in this case. Not until the 1930s did the government finally create a reservation for the Sokaogon (as they were now known), and even after the creation of this reservation many Sokaogon continued to reside in their traditional area. They do not argue that this continued residence establishes a right of occupancy that is good against Exxon and the other landowners who claim title to portions of the contested tract through grants by the United States. They argue that either they were not parties to the 1854 treaty and therefore can continue to assert their rights under the 1842 treaty or that, if they were parties, the treaty does not mean what it says.

They point out that the 1854 treaty does not even mention the Post Lake bands and that the published memoir of a white man who attended the council of the Lake Superior Chippewas held the following year, when the first annual payment called for by the treaty was delivered, states that at the council Chief Me-ge-see told the Commissioner of Indian Affairs (George Manypenny) that his band "was unprovided for, and without any right of location upon any of the reservations," and that in response "the commissioner directed [Me-gee-see] to come to his office after council." An oral tradition of the Sokaogon holds that beginning in 1854 Commissioner Manypenny and his successors repeatedly promised the Post Lake bands their own reservation; but there is no documentation of this tradition, which is at best embroidered (too many ransoms, shipwrecks, lost and stolen maps, and deathbed revelations to be plausible) and at worst fictitious. Manypenny was not involved in the negotiations for the treaty and did not sign it, although these facts are not in themselves conclusive; he might still have made a promise, though with what authority is unclear. Beginning in 1860 various white Indian traders repeatedly petitioned the Commissioner of Indian Affairs on behalf of the Post Lake bands to establish a separate reservation for the bands, and some of these petitions state that the reservation had been "promised" to the bands, which the plaintiff construes as evidence either that the Post Lake bands were never parties to the 1854 treaty or that the government failed to fulfill a treaty obligation to create a separate reservation for them. No government document so much as hints at any such promise, however, and several government documents state that the Post Lake bands are not entitled to their own reservation but must remove to one of the reservations created by the 1854 treaty. Because northeastern Wisconsin was sparsely populated the government decided not to use force against the Post Lake bands. But it never acknowledged their right either to remain where they were living or to have a reservation created specially for them. It took the position that they were bound by the 1854 treaty, that the government had performed its treaty obligations to them by creating reservations that they had a right to occupy, and that they were merely squatters on the land on which they continued to live.

Some of the petitions acknowledge that under the treaty the Post Lake bands were to be treated as part of the Lac du Flambeau band and thus entitled to live on its reservation. They say such things as, "we have a share in the Flambeau reservation"; "[the Post Lake bands] respectfully ask that they may be united with the Bands of Chippewa Indians at Lake du Flambeau . . . just as soon as their Great Father will furnish them the necessary facilities to go to farming"; "we do not want to move to the Lake Flambeau reservation to which we were apportioned by the treaty of 1854." An affidavit from an ethnohistorian points out (what is anyway pretty obvious) that these documents were not in fact prepared by Indians, who could not read or write, but by white men who may not have understood what the Indians were trying to tell them, and that in addition the Indian signatories of the 1854 treaty may not have had a clear idea of what exactly they were giving up. The Indians' notion of "property," if indeed they can be said to have had one, differs greatly from that of the Western legal and political tradition, which views "property" in land in abstract terms, as a (qualified) legal right to prevent entry upon and the use and enjoyment of a tract of land identified by visible or invisible boundary lines.

Read as a whole, the 1854 treaty unambiguously cedes the Chippewas' lands, including those of the Post Lake bands, whose chiefs signed the treaty along with the chiefs of the other Chippewa tribes, to the United States in exchange for a promise of reservations and annual payments. Even the signatory of an unambiguous contract can argue that it should be rescinded because it was procured by fraud or because the other party to the contract reneged on his promise, but the Sokaogon do not ask us to rescind the treaty or suggest that we have the power to do so. Any inference that their predecessors, the Post Lake bands, did not become parties to the treaty because they are not mentioned in it is refuted by the Sokaogon's acknowledgment that the chiefs of the bands were signatories and by the acknowledged objective of the treaty, which was to extinguish the Indians' rights of occupancy in Wisconsin and the other states in which the Chippewas were living so that white settlers could farm and build permanent structures without interference from the Indians. This objective required obtaining the agreement of, and thus binding, all the Chippewa tribes including the Post Lake bands, which despite their small size were known to be living in northeastern Wisconsin. The federal government apparently believed them to be a part of the Lac du Flambeau tribe, for which a reservation was being created, but took care to get the signatures of their chiefs; and the catch-all provision in the grant of the reservation to the La Pointe Indians made sure that any tribes not explicitly provided for would have an Indian community in which to live.

The plaintiff argues that even if the Post Lake bands were parties to the treaty, nevertheless the treaty conditioned the surrender of their right of occupancy under the 1842 treaty on the federal government's creating a separate reservation for the bands. They point out that the La Pointe and Lac du Flambeau reservations are remote from the area in which the Post Lake bands resided; true, the Lac du Flambeau reservation is only about 75 miles away, but that was a long distance in 1854. They argue that Me-gee-see and Ne-gig would not have signed the treaty had they not been promised a separate reservation. There is no textual handle for this claim, however; it is in tension with the catch-all provision relating to the La Pointe reservation and with the evidence that the Post Lake bands were components or affiliates of the Lac du Flambeau band; and it has no documentary support. The Post Lake Indians may have thought they had been promised a separate reservation where they were living, but there is no indication that their signing the treaty was conditional on the fulfillment of such a promise.

We must however consider the possible bearing of the distinction emphasized in previous cases, in particular *Lac Courte Oreilles Band v. Voigt*, 700 F.2d 341, 362-65 (7th Cir. 1983), between usufructuary rights and rights of occupancy. The former are rights in particular uses of land, such as (with reference to typical Indian uses) picking berries, trapping beavers, fishing, and performing religious rights at ancestral burial grounds. The latter are rights of permanent occupancy. The 1842 treaty, while ceding lands occupied by the Chippewa Indians to the United States, had reserved to them the right to hunt and "the other usual privileges of occupancy" until removed by order of the President. This oddly worded grant (for the right to hunt is not a privilege of occupancy, but of use) we interpreted in *Voigt* to cover both usufructuary and occupancy rights, and we held that the treaty of 1854 had abrogated only the latter, and only for tribes covered by that treaty. The idea behind the treaty, we explained, was that the Indian tribes that were party to it would be given reservations as their place of permanent occupation but that they could continue to use the land outside the reservations for hunting and so forth until the time came when their using it would impede occupation by white settlers.

The 1854 treaty does not distinguish explicitly between usufructuary and occupancy rights. It does not, moreover, appear to cede any land in Wisconsin – that land had been ceded by the 1842 treaty, in which the reservation of "other privileges of occupancy" had appeared. The interpretation of the 1854 treaty in *Voigt* as extinguishing occupancy rights was an inference from the fact that the treaty established Indian reservations and from the purpose reasonably to be ascribed to the treaty. The reservations created a place for the Chippewas to enjoy occupancy rights because they would no longer have such rights off the reservations. The hope was that the Chippewas would "settle down" and live like white men, farming the reservations. This is a perfectly intelligible interpretation of the treaty, but is it so clearly right as to dispense with the need for a trial? *Voigt* may be thought to have crossed this bridge, but we must remember that the Sokaogon unlike the tribes in that case claim not to have been a party to the 1854 treaty and we must remember too that we have been told to interpret Indian treaties in favor of the Indians, within the bounds of reason of course. *South Dakota v. Bourland*, 113 S. Ct. 2309, 2316 (1993); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985); *Winters v. United States*, 207 U.S. 564, 576-77 (1908); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918); *Lac Courte Oreilles Band v. Voigt*, *supra*, 700 F.2d at 350. Indian treaties are to be interpreted as the Indians themselves would have done, even if the understanding of the agents who negotiated and signed them on behalf of the federal government was different. *Jones v. Meehan*, 175 U.S. 1, 10-11 (1899); *Lac Courte Oreilles Band v. Voigt, supra*, 700 F.2d at 350. Ambiguities and mistakes alike are to be resolved in favor of the Indians, in recognition of the disadvantages of knowledge and power under which they labored in negotiating these treaties with a nation determined to use force if necessary to open up Indian lands to white settlement.

All this considered, we think the grant of summary judgment was proper. The defendants presented an interpretation of the treaty that was sensible, consistent with and indeed implied by its language, and consistent with all reasonably substantiated facts concerning the circumstances in which the treaty had been negotiated and signed. The treaty's purpose, as could be gathered from its words and logic and structure and the background circumstances, and for that matter the subsequent history up to the creation of the Sokaogon's own reservation in the 1930s, was to extinguish the Chippewa Indians' occupancy rights throughout the ceded (including previously ceded) areas in exchange for annual payments and for occupancy rights in reservations that would be established by the federal government. The treaty was intended to bind what are now the Sokaogon. Their authorized representatives signed it on the Sokaogon's behalf, thus making the Sokaogon a party; pursuant to the treaty, a reservation was created for Chippewas not specifically provided for in the treaty; and the placement of the chiefs' signatures confirmed that the Sokaogon

(Post Lake) Indians would be entitled if they preferred to remove to the reservation expressly created for the Lac du Flambeau tribe. No explanation has been offered for why if the Post Lake Indians were clamoring for their own small reservation the treaty did not promise it to them.

To ward off summary judgment under *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the Sokaogon had to present evidence which might persuade a reasonable trier of fact either that they had not in fact been a party to the treaty or that the treaty had not extinguished their rights of occupancy. The oral tradition of a promised reservation is not *evidence*, that is, evidence admissible in a court of law, which is what Fed. R. Civ. P. 56 explicitly requires in order to create a triable issue; at least no effort was made by the Sokaogon's counsel to cast it into a form in which it would be admissible in a court of law. The admissibility of the documents in which the Indians' agents referred to a "promised" reservation, however, is not contested (those documents come within the hearsay exception for "ancient documents," Fed. R. Evid. 803(16)); and while these documents are consistent with an inference that the reservation at Lac du Flambeau *was* the promised reservation, they do not compel that inference. But neither do they support the inference that the Post Lake bands retained their rights of occupancy despite the 1854 treaty. Of that there is no evidence other than what might be inferred from the treaty's silence with respect to those bands. Yet not only did their chiefs sign, but the bands accepted the benefits of the treaty – or at least the annual payments stipulated in the treaty, which were a principal part of the consideration. This implies that they accepted the burdens of the treaty as well – for one cannot limit the enforcement of a contract to a provision which happens to benefit the plaintiff – and thus that they surrendered their right of occupancy. Otherwise it would have been all take and no give. The testimony of an ethnohistorian or anthropologist might be admissible to explain the Indians' understanding of these documents or of the treaty, but the Sokaogon have not presented an affidavit or other evidence from any qualified person who is willing to attest that the Post Lake bands did not think that the 1854 treaty extinguished their rights to occupy land outside Indian reservations. A trier of fact would not be permitted to indulge the speculation that Me-gee-see and Ne-gig signed the treaty for the heck of it, believing that the bands which they headed up could thereafter exclude white settlers while receiving an annuity from the federal government.

Even if the government made and broke a promise to create a reservation covering the very land at issue in this case, this would not in itself abrogate the Post Lake bands' relinquishment of occupancy rights in the 1854 treaty. They would have to show that the later treaty conditioned that relinquishment on the creation of a separate reservation for them. Nothing in the treaty itself, the oral tradition, or the extensive documentation submitted by the parties supports the inference of such a condition. A letter dictated by Me-gee-see and Ne-gig in 1869 comes closest; it alleges that the promise of a separate reservation induced them to sign the 1854 treaty. But the Sokaogon do not seek either to enforce or to abrogate that treaty. They seek to enforce their rights under the earlier treaty, and nowhere in the voluminous materials on which they rely is there any intimation of a claim to remain on the land *under the 1842 treaty*. Nowhere is there a suggestion that the 1854 treaty was suspended until the separate reservation was created. No doubt, as held in *United States v. Bouchard*, 464 F. Supp. 1316, 1354-55 (W.D. Wis. 1978), reversed on other grounds under the name *Lac Courte Oreilles Band v. Voigt, supra*, the tribes that were parties to the 1854 treaty did not actually relinquish their right of occupancy until the reservations promised in the treaty were actually created; otherwise there would have been an interval in which they had no right of occupancy anywhere. But once the reservations in which the Sokaogon had rights of occupancy were created, their rights of occupancy under the 1842 treaty, as distinct from their usufructuary rights under it, ceased.

The test for summary judgment is whether, if the record compiled in the summary judgment proceeding were the record of a trial, the judge would be required to grant a motion for directed verdict to the movant, the defendants in this case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). He would be here.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: August 12, 1993

BEFORE: Honorable RICHARD A. POSNER, Circuit Judge
Honorable JOEL M. FLAUM, Circuit Judge
Honorable HUBERT L. WILL, Senior District Judge*

No. 92-3920

SOKAOGON CHIPPEWA COMMUNITY,
Plaintiff – Appellant

v.

EXXON CORPORATION, a corporation chartered in the State of New Jersey, STATE OF WISCONSIN, FOREST COUNTY, a political subdivision of the State of Wisconsin, et al.,
Defendants – Appellees

Appeal from the United States District Court
for the Eastern District of Wisconsin
No. 86 C 599, Robert W. Warren, Senior Judge

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, **IT IS ORDERED AND ADJUDGED** by this court that the judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered this date.

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* Honorable Hubert L. Will of the Northern District of Illinois, sitting by designation.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604
October 20, 1993

Before

Hon. Richard A. Posner, Chief Circuit Judge

Hon. Joel M. Flaum, Circuit Judge

Hon. Hubert L. Will, Senior District Judge*

SOKAOGON CHIPPEWA COMMUNITY, *Plaintiff-Appellant,*	)	**Appeal from the United States District Court for the Eastern District of Wisconsin.**
No. 92-3920 v.	)	
EXXON CORPORATION, STATE OF WISCONSIN, FOREST COUNTY, *et al.*, *Defendants-Appellees.*	)	**No. 86 C 599** **Robert W. Warren,** ***Senior Judge.***

ORDER

On August 26, 1993, plaintiff-appellant filed a petition for rehearing with suggestion for rehearing en banc. All of the judges on the original panel have voted to deny the petition, and none of the active judges** has requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

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* Hon. Hubert L. Will, of the Northern District of Illinois, sitting by designation.

** Hon. Walter J. Cummings and Hon. John L. Coffey took no part in the consideration of the rehearing en banc.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

SOKAOGON CHIPPEWA COMMUNITY,
Plaintiff,

v. Case No.: 86-C-0599

EXXON CORPORATION,
a corporation chartered in
the State of New Jersey;,
STATE OF WISCONSIN;
FOREST COUNTY,
a political subdivision of the
State of Wisconsin;
LANGLADE COUNTY,
a political subdivision of the
State of Wisconsin;
ONEIDA COUNTY,
a political subdivision of the
State of Wisconsin;

Defendants.

DECISION AND ORDER

Before the Court are the defendants' motions for summary judgment. Specifically, at issue is the plaintiff's right to possess and occupy 12 mile by 12 mile tract of land in Northern Wisconsin ("the subject territory"). Each of the named defendants has legal title to portions of the subject territory, and the plaintiff has petitioned this Court for declaratory relief protecting their rights in the land, which they allege are protected by treaties more than a century old.

I. FACTUAL BACKGROUND

A. CHRONOLOGY

The Sokaogon Chippewa Community ("Sokaogon") is a Native American tribe which has been known in the past as the Sokaogon Band, the Mole Lake Band, the Post Lake Band, the Rice Lake Band, the Pelican Lake Band, the Lake Bands, and the Lost Band. Complaint at ¶ 1. The Sokaogon are descendants of the Lake Superior Chippewa tribes that roamed the Northern Wisconsin area before the settling of Wisconsin occurred in the early to mid-1800's. The members of the tribe currently live on a Federal reservation in Forest County, Wisconsin (the "Mole Lake Reservation"). Complaint at ¶ 1.

In the middle of the nineteenth century, the United States was rapidly expanding its boundaries. Settlers moved westward relentlessly, and the federal government encouraged this expansion through land grants and homesteading. Clearings sprung up on land that had formerly been inhabited only by Native Americans. When the rights of the settlers and Native Americans conflicted, the government responded by pushing the tribes further west, out of the paths of the settlers. This was accomplished by a series of treaties and Congressional and executive orders, through which the Native Americans ceded their rights to the land in exchange for annuities and small reservations. Brown, *Bury My Heart at Wounded Knee*, Ch. 1.

During this period of expansion, Native Americans already occupying land were deemed as possessing two types of interests in non-reservation land. "Aboriginal title" was the term given to the tribe's right to occupy land claimed by settlers in fee title and was based upon the "actual, exclusive and continuous occupancy" of the land prior to white settlement. *United States v. Bouchard* ("*Bouchard*"), 464 F.Supp. 1316, 1347 (W.D. Wis. 1978), citing *Tee-Hit-Ton Indians v. United States,* 348 U.S. 272 (1955); *Strong v. United States,* 518 F.2d 556, 207 Ct.Cl. 254 (1975). Aboriginal title was good against any other claims to the land except for those of the United States, which could extinguish Native Americans' title without the payment of compensation normally required by the Fifth Amendment. *Bouchard,* 464 F.Supp. at 1347; *Tee-Hit-Ton,* 348 U.S. at 284-85 (aboriginal title is not compensable, since it is a right of occupancy rather than a property right).

In comparison, "treaty-recognized title" meant that Congress had recognized the Native Americans' right to occupy the land as a legally protectible interest, which could be extinguished only by payment of compensation. *Lac Courte Oreilles Band v. Voigt (LCO I),* 700 F.2d 341, 352 (7th Cir. 1983), citing *United States v. Sioux Nation,* 448 U.S. 371, 415 n. 29 (1980). In the early to mid-19th century, much of this country's expansion was accomplished through treaties in which Native Americans ceded land to which they had aboriginal title in exchange for treaty-recognized title to smaller portions of that land. Wilkinson, *To Feel The Summer In The Spring: The Treaty Fishing Rights of the Wisconsin Chippewa,* 1991 Wis.L.Rev. 375, 385.

One such treaty was the Treaty of the Chippewa, signed in 1842 ("the 1842 Treaty"), in which Native Americans conveyed a vast tract of land in Northern Wisconsin and the Upper Peninsula of Michigan to the United States. This area began to attract white settlers in the mid-1800's, as rich mineral deposits had recently been discovered both on and underneath the land. Keller, *An Economic History of Indian Treaties in the Great Lakes Region*, American Indian Journal, February 1978, 2, 16. The 1842 Treaty was intended to facilitate the settlement of this land and encourage mineral development. Due to its underlying purpose, the 1842 Treaty was commonly called "the Miners' treaty." Exxon, App. at 298.

The treaty effectively extinguished any aboriginal title or treaty-recognized title the Lake Superior Chippewa had formerly held over the land. However, the Chippewa retained their "usual privileges of occupancy" until they were "required to remove by the President of the United States."[1] Article VI of the 1842 Treaty provides that "[t]he Indians residing on the Mineral district shall be subject to removal therefrom at the pleasure of the President of the United States."[2] Nevertheless, the government did not anticipate a rapid settlement of the area or a need for early removal and both the Chippewa and the Indian agents[3] in the area probably believed that the usual privileges of occupancy could be exercised without interference for generations to follow. *United States v. Bourchard*, 464 F. Supp. at 1327. The Post Lake Band, designated as the "Lake Bands" by the 1842 Treaty, accepted these terms through Chief Ke-Che-Wabishashi, or Chief Martin.

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[1] The "usual privileges of occupancy" reserved for the Chippewa by the 1842 Treaty have been interpreted by the Seventh Circuit as consisting of both the right to possess and occupy the land and the right to conduct usufructuary activities within the area. *See Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341 (7th Cir. 1983). "Usufructuary" is defined as the use and enjoyment of the profits of property belonging to another as long as that property is not damaged or altered in any way. In *Lac Courte Oreilles Chippewa Ind. v. State of Wisconsin*, 653 F.Supp. 1420 (W.D. Wis. 1987), the court listed each particular usufructuary activity engaged in by members of various Lake Superior Chippewa tribes in the middle of the 19th century. *Id.* at 1426-28. The court also held that the 1842 Treaty permitted the Chippewa to continue with these practices on the land until ordered to remove from it by the President of the United States.

[2] Exxon concedes that the land in which it holds an interest is covered by the 1842 Treaty, even though it has asserted that a

The Post Lake Band had used the land ceded under the 1842 Treaty for hunting, fishing, trapping, harvesting wild rice, and collecting maple sugar. Exxon, App. at 1387. They knew that there were copper deposits under the ground, and there is evidence that some earlier tribes had mined the copper near Lake Superior before the eighteenth century. Exxon, App. at 503-29, 536-39. However, there is no indication that the Chippewa had ever mined the land, although they did occasionally collect surface copper and may have used it for religious purposes. Exxon, App. at 441.

Apparently, the Chippewa understood that their rights to live, hunt and fish upon the land did not override the United States' rights to the minerals underneath.

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portion of the subject territory was ceded to the United States by the Chippewa through the 1837 Treaty. Exxon's Findings of Fact at ¶ 19. The 1837 Treaty is similar in substance to the 1842 Treaty, but concerns a different portion of land. Neither the State of Wisconsin nor the municipal defendants have expressed an intent to mine on their lands.

[3] The term "Indian agent" is used to describe employees of the Department of the Interior who served as a liaison between the Native Americans and the Commissioner of Indian Affairs.

One of the objectives of the 1842 Treaty was to reserve the mineral wealth of Wisconsin and Michigan for the government. Witnesses to the treaty negotiations have confirmed the government's records that the Chippewa were informed that the "principal benefit your great Father expects from your lands at present is, the removal of the minerals which are said to be on them; and not that the whites intend to settle on them at present." Exxon, App. at 1141, 1007. Many of the tribes with representatives at the negotiations for the 1842 Treaty indicated that the purpose of the treaty was to convey mineral rights to the government. Exxon's Proposed Findings of Fact, ¶¶ 43-54. Nevertheless, the Chippewa were assured that they would be able to use the land for an indefinite period of time until mining commenced or until white settlers came on to the lands. Exxon, App. at 938, 948, 961, 982, 1007-08. Moreover, they were told that they could remain on the land even after whites had settled there if they were "not in the way of the whites, and live[d] on terms of friendship with them." Exxon, App. at 938.

Development in the ceded territory occurred at an unforeseeable pace and it soon became clear that the Chippewa would not be able to exercise their rights on the land without disturbing the white settlers. In 1850, President Zachary Taylor sought to revoke the Chippewa's privileges of occupancy and attempted to remove them from the ceded territory completely through the Presidential Removal Order of 1850. He intended to relocate them in Minnesota, west of the Mississippi and far from the proposed paths of westward settlers.

In an effort to enforce the Removal Order and lure the Lake Superior bands west of the Mississippi, the Indian Office announced that the annuities due under the 1842 Treaty would be paid on October 15, 1850 in Sandy Lake, Minnesota, rather than at La Pointe in Wisconsin. Although the Chippewa did not wish to leave their homelands, many made the journey to Minnesota to collect supplies. Unfortunately, the Indian agent was delayed in St. Louis, and did not arrive in Minnesota until late November. In the meantime, many Native Americans had perished from malnutrition and disease. When the supplies were finally distributed on December 3, the waterways used by the Chippewa were frozen and the tribes were forced to walk all the way back to their camps in Wisconsin. This bitter experience strengthened their resolve to stay in Wisconsin. Danziger, *They Would Not Be Moved*, Minnesota History, Spring 1973, 175, 177-78 (Exxon App. at 283-284).

The plight of the Chippewa garnered attention, and both whites and Native Americans protested the President's Removal Order. A band of Chippewa chiefs even travelled to Washington, D.C. in 1852 to secure President Millard Fillmore's promise not to enforce the order. The President kept his word, and the order was never enforced. However, the Chippewa had become fearful of losing their right to live upon their ancestral homelands. *See e.g., United States v. Bouchard*, 464 F. Supp. at 1329. In 1853, leaders from several of the Northern Wisconsin tribes wrote a petition to the government in which they explained:

> We are at last convinced, that the perpetuity of our nation can only be secured by permanent

> settlements. We are awakened to the necessity of acquiring a possession which shall be our own and may not be overflowed by the multitudes who come from your cities and towns to dwell in the forests.

Exxon App. at 1179.

In the 1850's, federal policy toward Native Americans shifted from the relocation of Eastern tribes to the setting aside of smaller parcels of land as reservations. Wisconsin's citizens and legislature did not object to the Lake Superior Chippewa remaining in Wisconsin, as they were "a peaceable, quiet, and inoffensive people." *Bouchard*, 464 F. Supp. at 1330.

As a result of these events, the Chippewa and the United States negotiated the Treaty of the Chippewa in 1854 ("the 1854 Treaty"). Even though the government may have hoped to remove all of the Lake Superior Chippewa to Minnesota, it soon became evident that this would be impossible. Indian Agent Henry C. Gilbert, who had warned the government in 1853 that the Chippewa would "sooner submit to extermination than comply" with the 1850 Removal Order, was able to negotiate the treaty only by promising the Chippewa reservations in their homeland. "Without yielding these points," he wrote in October of 1854, "it was idle for us to talk about a treaty." *Bouchard*, 464 F. Supp. at 1331; *see also* Danziger, *They Would Not Be Moved*, Minnesota History, Spring 1973 at 178.

The government hoped that consolidation of Native Americans on reservations would hasten their assimilation into American society and better enable Indian agents to oversee the tribes' development. Apparently, it had been difficult for the agents to contact tribe members when necessary, due to their nomadic habits. By keeping them on defined parcels of land, Indian agents would know where their charges were at any given time. Concentrating Native Americans on reservations would "induce them to adopt the habits and pursuits of civilized life" as well. Exxon, App. at 698, citing from the Report of the Commissioner of Indian Affairs, November 30, 1857.

To allow this policy of concentration and "civilization" to take effect, the 1854 Treaty "set apart, and [withheld] from sale, for the use of the Chippewas of Lake Superior . . . tracts of land." 1854 Treaty, Art. II. The government manifested its intent that the Chippewa should settle upon these reservations by referring to them as "homes hereby set apart for them" in Article XI. The treaty also spoke of the land or points set aside for the Chippewa in Articles V and VII. Three reservations of land were set aside for the exclusive benefit of the Lake Superior Chippewa in Northern Wisconsin.

One of these reservations was for the La Pointe band "and such other Indians as may see fit to settle with them.[4]" 1854 Treaty, Art. II, 2d. There were another two parcels of land near Lac de Flambeau and Lac Court Orielles set aside for "the other Wisconsin bands." 1854 Treaty, Art. II, 3d. A copy of the treaty shows that Chief Me-gee-see and Chief Ne-gig, both of the Post Lake Chippewa, were present at the 1854 Treaty negotiations and signed the treaty as members of the Lac de Flambeau Band by making their "X" mark. 1854 Treaty (Exxon, App. at 120).[5] Therefore, under the 1854 Treaty, the Post Lake Band became entitled to live at the reservations at La Pointe, Lac de Flambeau, or Lac Court Oreilles.

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[4] This is the land known today as the "Bad River Reservation."

Regardless of whatever rights the post Lake Band kept or lost after the ratification of the 1854 Treaty, they maintained approximately the same nomadic lifestyle as they had previously. Contrary to the government's hopes and expectations, they did not establish a permanent residence at any of these reservations, although they would travel to Lac de Flambeau to collect their annuity payments. Their history throughout the decades following the 1854 Treaty is marked with objections to the government's attempts to place them on the Lac de Flambeau reservation. D.C. Leach, a government agent, reported in 1863 that several bands of Chippewa refused to move to the Lac de Flambeau reservation. Exxon, App. at 754. In 1879, the Post Lake Band's council sent a letter to the Commissioner for Indian Affairs, stating:

> We do not want to move to the Lake Flambeau reservation to which we were apportioned by the treaty of 1854, as this is no agricultural land, but mostly pine, which is coveted now by

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[5] There is other evidence in the record that Chief Me-gee-see may not have been present at La Pointe when the Chippewa agreed to the terms of the 1854 Treaty. See Exxon App. at 2028 ("Chief Mi-gee-see . . . was unable to be there"); 2047 ("Chief Megeesee could not go on account of having burnt his feet."). However, it is uncontroverted that the Post Lake Band was represented by at least Chief Ne-gig.

> whites, and it will be only a short time before we will be obliged to sell out then.

Exxon, App. at 1455-56. In fact, there was only one instance in which the Post Lake Chippewa even offered to relocate to the reservation, and that was conditioned upon receiving substantial government aid. Exxon, App. at 1346-47.[6]

At the same time, the Post Lake Band was demanding a reservation of its own. In 1869, Chiefs Me-gee-see and Ne-gig wrote to the Commissioner of Indian Affairs, stating that they had been induced to sign the 1854 Treaty by promises that they "were not signing away our homes, but that we would have a reservation in the vicinity of Post Lake, where we could fish, gather Rice and make sugar." Exxon, App. at 1387-88.[7] There are other letters in the record where the Post Lake Chippewa implored the government to set out metes and bounds of the land that was promised to them under the 1854 Treaty. Exxon, App. at 1311, 1452.

From this history evolved the saga of a "lost reservation" which had been promised to the Post Lake Chippewa by the government, and a "lost map" that had set forth the metes and bounds of the reservation. Although there are many different versions of this history, they all have a common thread. The Post Lake Chippewa deny signing away their rights of occupancy in 1854 in the land ceded by the 1842 Treaty without indications that they would receive some consideration in the form of land. Some versions state that Chief Me-gee-see was not present at the 1854 Treaty negotiations; others state that his approval of the treaty was contingent upon promises of a reservation for his people that he received from government agents. The Sokaogon believe that an agent met with Chief Me-gee-see within fifteen years after the ratification of the 1854 Treaty and negotiated a reservation for the Post Lake Chippewa. The reservation was set out on a map and a copy was made. En route to Washington, D.C. with a copy of the map, the agent perished in a shipwreck on Lake Michigan and the map disappeared with him. The Chippewa had given the other map to a trader named William Johnson for safekeeping. Johnson either stole it, refused to return it or held it as security for some unknown debts. Apparently, another white trader stole the map from Johnson and demanded money from the Post Lake Band for its return. They did not pay the ransom, for they were convinced that the other copy was safe in Washington, D.C. In any case, there is no tangible document today, but many Sokaogon still believe that this map existed and entitles them to a reservation encompassing the entire subject territory. See Exxon's Findings of Fact ¶¶ 84-147 and references therein.

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[6] The government refused to give the Chippewa any additional benefits aside from those enumerated in the 1854 Treaty, so the Post Lake Band did not settle on a reservation at this time.

[7] Apparently, the authors of the letter were concerned that the government would not honor this alleged promise. The Chiefs noted that "[i]f this provision is not inserted in the treaty, it was double dealing in the commissioner, and we hope that the magnanimous government of the United States will not stoop to take such an ignoble advantage of us ignorant Indians."

Beginning in the late 1880's, the government began dividing up the Wisconsin reservations into 80 acre allotments, in accordance with the 1854 Treaty. When the Post Lake Bands went up to Lac de Flambeau to receive their allotments, they were turned away by Chief May-diva ah sung of the Lac de Flambeau Band. Exxon, App. at 1859. Other government documents indicate that the Lac de Flambeau tribes believed that the Rice Lake Chippewa (or the Chippewas living near Crandon) belonged to the L'Anse band in Michigan. Exxon, App. at 1534-1552. Whatever the reason the Post Lake Band did not relocate to the Lac de Flambeau reservation, it is clear that they owned no land at the turn of the century.

Until 1934, the members of the Post Lake Band had no designated place of residence. Some of them were assimilated into other tribes through marriage and lived on reservations in Wisconsin and Michigan. Exxon, App. at 1642-44, 1688, 1699-1704, 1804-05, 1811. Others crowded onto small tracts of land that had been bought by individual members of the tribe. *Id.* at 1692, 1858-59. Still others became squatters, living in abandoned lumber camps and other desolate areas. *Id.* at 1613-14. These Native Americans were forced to move whenever white settlers came along to claim the land.[8] They invariably left quietly and quickly and moved on to find another deserted piece of land.

In 1934, the Indian Reorganization Act authorized the Secretary of the Interior to purchase new lands and turn them into Indian reservations. 25 U.S.C. § 465, 467. The

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[8] Willard Ackley, who was once Chief of the Sokaogon, testified in 1948 that he lived in a wigwam when he was a boy, but then "white man, he buy land, white man says 'my land,' we move out, we move a little ways, maybe we make wigwam again, and that is the way we kept on all the time, many years, long time." Exxon App. at 1998.

Sokaogon received 1,437 acres in 1939 and additional land in 1982. 4 Fed. Reg. 3431-32 (Exxon, App. at 178-79); 47 Fed. Reg. 17337-38 (Exxon, App. at 180-81); 48 Fed. Reg. 343 (Exxon, App. at 182). This is the area known today as the Mole Lake Reservation, which is adjacent to the western edge of the subject territory.

Prior to the mid-1970's, the Sokaogon continued to use the land within the subject territory consistent with the "usual privileges of occupancy." They would harvest berries in the summer, gather wild rice, hunt and fish. They also conducted tribal rituals near Post Lake.[9] Affidavit of Fred Ackley, Jr. (Exxon, App. at 25-28).

B. EXXON'S MINERAL RIGHTS

Exxon's predecessors began to acquire their mineral rights to lands in the subject territory in 1850[10] through a series of statutes. One statute was enacted "for the purpose of aiding in the construction of a railroad," 11 Stat. 20 § 1, and another "to aid in the construction of a military wagon-road." 12 Stat. 797, § 1 (Exxon, App. at 138, 142). The remainder of Exxon's property had been sold initially to private settlers by the United States or the State of Wisconsin under Homestead Acts. Exxon, App. at 131-32, 140-41. All but two of the ninety-three land parcels in question have been privately owned since 1884.

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[9] The Sokaogon have alleged that the land within the subject territory, but outside the bounds of their reservation, holds religious and historic significance for them. Apparently, there are ancient burial sites on the shores of Post Lake. However, Exxon has argued that these historic sites are outside the Crandon Project's boundaries, and some fall completely outside the subject territory.

[10] It is not necessary to trace Exxon's chain of title back to the original purchasers of the land. Exxon has submitted records of recorded deeds in Exhibit A of its motion for summary judgment, and the Sokaogon have not contested the accuracy of the deeds. Since recorded deeds are *prima facie* evidence of good title, *Riha v. Pelnar*, 86 Wis. 408, 412-13 (1893), Exxon shall be regarded as owning the rights it asserts in each of the parcels of land in Exhibit A.

Exxon's present interests in publicly-owned land extend to certain subsurface rights under roads owned by the Town of Nashville and an option to buy 880 acres of land from Forest County. Exxon has exercised this option, but as of November 12, 1991, there had been no closing on the land. The Sokaogon currently have the right to exercise their usufructuary privileges upon this land, but these privileges will presumably cease once the land becomes privately-owned. *See e.g., Lac Courte Oreilles Band v. State of Wisconsin,* 775 F.Supp. 321 (W.D. Wis. 1991) (final judgment).

Exxon purchased its interests in the subject territory in connection with its "Crandon Project," a mine expected to yield tons of zinc, copper, and lead ore. Exxon, App. at 563. While the focus is on the mineral lying under the earth's surface, a substantial mining operation like the Crandon Project requires surface development as well. Exxon anticipates adding a mine-mill complex, a mine waste disposal facility, a rail spur, two roads, and a wastewater discharge pipeline to its property. Exxon's Findings of Fact ¶ 6. Although there has been a great deal of money invested in the project for exploration and development, no actual mining has begun. At present, Exxon claims that it is waiting for an economically opportune time to begin harvesting minerai deposits from this land. A favorable environmental impact statement was issued by the Wisconsin Department of Natural Resources in 1986. Exxon, App. at 556-594. Therefore, Exxon is prepared to begin mining once the economic conditions warrant a more significant investment. Affidavit of Fred Ackley, Jr. (Exxon, App. at 25-28). Sometime in the mid-1970's, Exxon's land within the subject territory was fenced, which curtailed the Sokaogon from carrying out their activities on the land. In 1986, the tribe filed its first complaint and embarked on the tortuous path which has led to today's decision.

II. PROCEDURAL HISTORY

The Sokaogon set forth its original causes of action in a complaint filed on June 6, 1986 in the Eastern District of Wisconsin. It named as defendants the United States of America, the State of Wisconsin, Forest County, Langlade County, and Oneida County. The defendants answered the complaint, and the United States of America moved to dismiss the charges against it on September 3, 1986. Shortly thereafter, the plaintiff moved to amend its complaint to include as defendants others with interests in the subject territory. Exxon was among these additional defendants.

The United States' motion to dismiss was granted as to the original complaint. The plaintiff's request to amend its complaint was denied, but it was given leave to file a second amended complaint and did so on January 23, 1987. The second amended complaint also included

Exxon as a defendant, as-well as the United States. Once again, the United States filed a motion to dismiss for lack of subject matter jurisdiction, which was denied without prejudice. At this juncture, the judge presiding over this matter recused himself, and the case was randomly reassigned to this Court.

The United States filed a motion for reconsideration of its motion to dismiss. This Court found that the plaintiff was time-barred from pursuing its complaint against the government under section 70K of the Indian Claims Commission Act (25 U.S.C. §§ 70-70n-2), 28 U.S.C. § 2401(a), and the Quiet Title Act (28 U.S.C. § 2409a(f)). The statutory waiver of its sovereign immunity was ineffective, and consequently, this Court lacked jurisdiction over the United States. After determining that the United States was an "indispensable party" to the litigation under **Fed.R.Civ.P.** 19(b), this Court found that it did not have jurisdiction over the remainder of the complaint. Furthermore, it held that to continue the action in the absence of the United States would be contrary to equity and good conscience. For these reasons, this Court *sua sponte* dismissed the entire complaint on August 9, 1988.

The plaintiff appealed to the Seventh Circuit, which held that even though the dismissal of the United States as a defendant was proper, the case could proceed in its absence. On July 24, 1990, the case was remanded back to this Court with instructions to proceed in the absence of the United States as a defendant.

After engaging in extensive discovery, the State of Wisconsin and Exxon have filed motions for summary judgment based on substantive and procedural arguments. Once the motions were fully briefed, this Court reviewed them and concluded that oral argument could clarify the issues presented. The parties presented their oral arguments on November 12, 1991, and this matter is now ripe for summary judgment review.

III. LEGAL FRAMEWORK

A. SUMMARY JUDGMENT

The standard for summary judgment was set forth by the Seventh Circuit in *Howland v. Kilquist*, 833 F.2d 639 (1987).

> **Fed.R.Civ.P.** 56 (c) provides that a district court shall grant summary judgment 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' When the facts are disputed, the parties must produce proper documentary evidence to support their contentions, and may not rest on mere allegations in the pleadings, *Posey v. Skyline Corp.*, 702 F.2d 102, 105 (7th Cir. 1983), or upon conclusory statements in affidavits. *First Commodity Traders v. Heinold Commodities*, 766 F.2d 1007, 1011 (7th Cir. 1985). In reviewing a grant of summary judgment, all reasonable inferences from the evidence presented must be drawn in favor of the opposing party. *Matsushita Electronics Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) . . . The mere existence of a factual dispute will not bar summary judgment unless 'the disputed fact is outcome determinative under

> governing law.' *Egger v. Phillips*, 710 F.2d 292, 296 (7th Cir. 1983) (*en banc*).

Id. at 642.

The United States Supreme Court further clarified the scope of **Fed.R.Civ.P.** 56 in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). In *Celotex*, the Court held that the initial burden is on the moving party to demonstrate "with or without affidavits" the absence of genuine issues of material fact and that judgment should be granted as a matter of law in the moving party's favor. *Id.* at 323. Once the moving party has met its burden, the opposing party must "go beyond the pleadings" and designate specific facts to support each element of its cause of action, showing there is a genuine issue for trial. *Id.* at 322-23.

In *Anderson*, the Court stated that the presence of a genuine issue of fact is to be determined by the substantive law controlling that case or that issue. *Id.* at 252. The Court added that for purposes of Rule 56, a genuine issue of material fact exists "if evidence is such that a reasonable jury could return a verdict for the non-moving party." *Id.* at 248. The evidence must be evaluated in the light most favorable to the nonmovant in that all justifiable or reasonable inferences are to be drawn in its favor. *Id.* at 255. However, a court need not draw every inference in the non-moving party's favor unless there are facts presented which reasonably support these inferences. *LCO I*, 700 F.2d at 349.

B. NATIVE AMERICAN LAW

Because Native Americans were put at a disadvantage in their negotiations with the government, their treaties should be interpreted leniently to compensate for their lack of bargaining power. *See e.g., Choctaw Nation v. Oklahoma,* 397 U.S. 620 (1970); *Choctaw Nation v. United States,* 318 U.S. 423 (1943); *United States v. Shoshone Tribe,* 304 U.S. 111 (1938). In *Worcester v. Georgia,* the Supreme Court held that treaties with Native Americans must be construed as the Native Americans understood them at the time. *Worcester,* 31 U.S. (6 Pet.) 515, 528 (1832). This general rule was refined and expanded through-out the nineteenth and twentieth centuries as Native Americans ceded more and more of their land to the government, which in turn gave or sold it to white settlers. For instance, in *Choctaw Nation v. United States,* 119 U.S. 1 (1886), the Supreme Court noted the disparity of bargaining power between the government and the Indians. *Jones v. Meehan,* 175 U.S. 1 (1899) reminds courts that Native Americans relied upon government-employed translators to inform them of the conditions of the treaties and were not familiar with the white man's legal system.

This is not to say that nonexistent rights should be read into treaties when it is clear that no such rights were intended. Treaties and Congressional acts involving Native Americans are meant to be construed to effect the purposes for which they were executed or enacted. "The underlying premise is that Congressional intent will control." *Rosebud Sioux Tribe v. Kniep,* 430 U.S. 584, 586 (1976) (citing *DeCoteau v. District County Court,* 420 U.S. 425, 444 (1975)). A court may look to the words of the treaties and the surrounding circumstances in determining the government's intent. *Mattz v. Arnett,* 412 U.S. 481, 505 (1973). If ambiguities exist in the wording of the treaties, they are to be resolved in the Native Americans' favor, but this "general rule does not command a determination that reservation status survives in the face of congressionally manifested intent to the contrary." *Rosebud Sioux Tribe,* 430 U.S. at 587.

Once Native Americans have treaty-recognized title, it cannot be extinguished by the United States unless compensation is paid. *LCO I,* 700 F.2d at 352. "[A]brogation of treaty-recognized title requires an explicit statement by Congress or, at least, it must be clear from the circumstances and legislative history surrounding a Congressional act." *Id.,* citing *Mattz v. Arnett,* 412 U.S. 481, 505 (1973). In *LCO I,* the law was extended to apply to treaty-recognized rights. Because destruction of treaty-recognized rights would also subject the United States to a claim for compensation, *Menominee Tribe v. United States,* 391 U.S. 404, 413 (1968), the Seventh Circuit concluded that extinguishing these rights necessitated the same clear showing of Congressional intent that is used for disputes involving treaty-recognized title. *LCO I,* 700 F.2d at 354 (treaty-recognized rights may not be extinguished by implication).

C. THE LCO CASES

The Western District of Wisconsin, in a series of cases ("the *LCO* cases") beginning with *United States v. Bouchard,* 464 F.Supp. 1316 (1978) and becoming final in March, 1991 with *Lac Courte Oreilles Band, et al. v. State of*

Wisconsin, et al., Case No. 74-C-313-C (final judgment, March 19, 1991), determined the modern-day usufructuary rights of the descendants of the Lake Superior Chippewa. The Sokaogon joined as plaintiffs in 1983, after the matter was remanded to the district court for the second time in *LCO II*. State of Wisconsin's Brief in Support of Summary Judgment at 5. The resulting law and dicta from this string of cases is instructive, and in some situations, controlling.

In *Bouchard*, the court was confronted with three separate complaints requesting essentially the same relief – a declaration of the Lac Courte Oreilles ("LCO") Band's rights to hunt, fish and harvest on lands that had been ceded by the treaties of 1842 and 1854. In the portion of the ruling that dealt with the LCO Band's claim to hunting and fishing rights, the court found that the band's "usual privileges of occupancy" reserved in the 1842 Treaty had been extinguished on lands other than those reserved specifically under the 1854 Treaty. Because the Chippewa had explicitly retained these rights in earlier treaties, the court found the silence of the 1854 Treaty significant. It concluded that the Chippewa had ceded nearly all of their rights of permissive occupation that had been reserved in earlier treaties and the usufructuary privileges which accompanied these rights. The only properties on which these rights could be exercised after 1854 were the reservations named in the treaty.

The Seventh Circuit reversed the portion of the lower court's decision pertaining to the tribes' usufructuary rights. *Lac Court Oreilles Band, Etc. v. Voigt ("LCO I")*, 700 F.2d 341 (7th Cir. 1983). First, the Court concluded that the 1842 Treaty gave the Chippewa the rights of use for a period of time that would be determined by their behavior. If they harassed white settlers, they would lose their rights to the land. However, if there was no breach of the treaty, the government could extinguish the Chippewa's usufructuary rights only by compensating them, since that would have been a taking under the Fifth Amendment. Because the rights were treaty-recognized rights, a Congressional act would "be construed as extinguishing [them] only if the legislation expressly stated that such was the intent of Congress or if the legislative history and surrounding circumstances made clear that abrogation of treaty-recognized rights was intended by Congress. *LCO I*, 700 F.2d at 358.

Next, the Seventh Circuit concurred with the lower court's finding that the Chippewa's usufructuary rights were not affected by the Removal Order of 1850, since there was never any showing that the Chippewa had harassed any white settlers. The Removal Order was also invalid because President Taylor did not have the power to enforce it; it exceeded the scope of both of the earlier treaties. *Id.* at 362. Therefore, in 1851, the Chippewa still retained their treaty-recognized rights of occupancy reserved by the 1842 Treaty.

In its discussion of the 1854 Treaty's impact on modern tribes, however, the Seventh Circuit noted that there was no express statement in the 1854 Treaty extinguishing the usual privileges of occupancy. Instead, "the Chippewas believed that they had been promised the right to remain on and use the ceded land unless they misbehaved." *Id.* at 364. Further examination revealed that there was no clear Congressional intent to extinguish the privileges. The Chippewa had entered into two earlier treaties in which their usufructuary rights were specifically reserved. Since the Chippewa probably construed the 1854 Treaty as the same type of treaty, the Seventh Circuit found that they had every reason to believe they retained the usual rights. Therefore, the 1854 Treaty could at most *imply* that the Chippewa's rights were abrogated. Since "treaty-recognized rights [could not] . . . be abrogated by implication," *id.* at 365, the LCO Band continued to retain their rights.

In remanding the matter back to the Western District of Wisconsin, the Seventh Circuit assumed that the LCO Band's argument could not be extended to lands that were privately owned. Although *LCO I* did not set forth any direct guidance as to the Chippewa's usufructuary rights on privately owned land, the Court opined that the LCO Band's claim would be inconsistent with evidence showing their knowledge that the land would eventually be used for white settlement. *LCO I*, 700 F.2d at 365, n. 14.

On remand, the district court ruled in part that any usufructuary rights that continued to exist were limited to "those portions of the ceded lands that were not privately owned as of March 8, 1983."[11] *Lac Courte Oreilles Band. v. State of Wisconsin ("LCO II")*, 760 F.2d 177, 179 (7th Cir. 1985). The judge's literal interpretation of *LCO I* was criticized upon appellate review. Apparently, the Seventh Circuit had never meant to lock in the LCO Band's right to their land use to a designated time. It had found that the land was ceded in 1854 for the eventual purposes of settlement. Although the publicly-owned lands had not been settled as of March 8, 1983, there was no guarantee that they would never be settled. Therefore, the LCO Band's right to the land was not a perpetual right. It could be extinguished when the land became "privately owned." *Id.* at 182.

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[11] March 8, 1983 was the date on which the Seventh Circuit's decision in *LCO I* became binding.

LCO II then clarified *LCO I's* discussion of "privately-owned" land. The State of Wisconsin had suggested that once land was privately owned, it should keep that status as per the LCO Band's usufructuary rights, even if it had been bought back by a public entity. The Seventh Circuit repudiated this contention and stated that usufructuary rights could not be "laundered out" of publicly owned land by a mere "passing through." *Id.* In Wisconsin, there are parcels of privately-owned land upon which non-Indians may hunt or fish. The Seventh Circuit realized it would be unfair to exclude the Chippewa from this land when others with no treaty-protected rights could freely exercise the same type of privileges. It also recognized problems which might arise if claims were made on "quasi-public" lands, such as those properties on which schools, hospitals or highways were located. However, the Court did not provide specific guidance for these situations, and suggested that a district court should engage in a detailed factual examination in such cases. *Id.*[12]

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[12] This Court views the Seventh Circuit's ruling as authorization for district courts to create exceptions to the general rule for public policy reasons. For example, the *LCO II* court expressed concern that a cartel of private landowners would be able to eradicate all of the Chippewa's usufructuary privileges simply by buying publicly owned land and then reconveying it

In its third opinion in this matter, the district court expressed its discomfiture with the Seventh Circuit's factual finding that the Chippewa had understood that white settlement would extinguish their usufructuary rights. However, bound by the higher court's decision, he concluded that the Chippewa should at least be able to "enjoy a moderate living" by exercising their reserved rights on the ceded land, regardless of the land's ownership. *Lac Court Oreilles Chippewa Ind. v. State of Wisconsin*, 653 F.Supp. 1420, 1432 (W.D. Wis. 1987). Therefore, if the Chippewa could not enjoy a modest living off publicly owned land as a result of a diminution in their usufructuary rights, "appropriate measures must be taken for Chippewa activity on privately owned land to permit the Chippewa to enjoy a modest living." *Id.*

The final judgment in this string of cases was entered by Chief Judge Crabb on March 19, 1991. *Lac Courte Oreilles Band v. State of Wisconsin*, 775 F.Supp. 321 (W.D. Wis. 1991). While the Native Americans retained their rights to hunt, fish and gather with minimal state regulation, the court clearly limited these activities to lands either owned by public entities or privately-owned lands which were "enrolled in the forest cropland or open

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back to the state. By creating this loophole in allowing privileges to be exercised on privately-owned land, the Seventh Circuit empowered district courts to achieve results based upon fairness rather than strict property law. Through this language, the Chippewa are now entitled to exercise their usufructuary activities on privately owned land to the extent that they could not sustain a "modest standard of living" using just publicly-owned lands. *Lac Courte Oreilles Band v. State of Wisconsin*, 775 F.Supp. 321 (W.D. Wis. 1991) (final order).

managed forest lands program under Wis. Stat. ch. 77 at the time of the contemplated or actual attempted exercise of such rights." *Id.* at 323-24. The Sokaogon tribe and its members are bound by this judgment. *Id.* at 325.

The focus of the *LCO* decisions was on usufructuary privileges rather than the right to possess and occupy land, and the Seventh Circuit bifurcated the general right of occupancy into these two components in *LCO I*, 700 F.2d 341. There is a limited right to occupy land implicit in the exercise of usufructuary activities since the right to harvest or hunt is meaningless if a person cannot be physically present upon land. In the present action, the Sokaogon have asserted that they are entitled to more than a limited right of permissive occupation. Although the extent to which they wish to occupy and possess the land has not been made clear to this Court[13], it is apparent that they wish to assert more control over the subject territory than they have at present.

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[13] During oral arguments, Sokaogon's counsel described these rights as ranging from the right to erect temporary homes and live on the land for periods of time to the right to stand on the land and view it as one's own. In their brief in response to the State of Wisconsin's motion for summary judgment, the Sokaogan listed the following activities included in the right to possess and occupy: "the right to camp for whole seasons, the right to erect homes, to process one's harvest, to bury one's dead and conduct communial [sic] and religious rituals." Response at 9.

IV. DISCUSSION

A. EXXON'S ARGUMENTS

In a voluminous motion for summary judgment, Exxon has set forth various defenses to the Sokaogon's claims. First, it states that the privileges of occupancy reserved by the 1842 Treaty never extended to Exxon's surface or mineral interests within the subject territory, because that land will be used for mining or for activities associated with mining. In addition, Exxon argues that the "usual privileges of occupancy" do not extend to land that is privately owned. Exxon further asserts that any rights in the land that the Chippewa retained after 1842 were relinquished in the 1854 Treaty.

In its second argument, Exxon points to the fact that the United States had never made the subject territory into a reservation or even treated it like one. The 1854 Treaty did not, by its explicit language, reserve a discrete portion of land for the Post Lake Band. The tenor of communications sent to Washington D.C. by agents in Wisconsin indicated that the Chippewa living in the Post Lake and Rice Lake area were one of the "lost tribes" without a reservation of their own. Although the Sokaogon have claimed that they were promised a reservation by their "lost reservation" and "lost map" arguments, Exxon points to the factual discrepancies contained in the record which show that this claim is not historically consistent. Furthermore, even if the Sokaogon were entitled at one time to retain these privileges, Exxon contends that they must be precluded now because of their failure to bring their claims in a timely fashion.

Exxon has also put forth several procedural bases for dismissal pursuant to Federal Rule of Civil Procedure 19. First, it claims that the United States is the only party against whom the Sokaogon have a claim for relief and that Rule 19 also prohibits an adverse judgment against Exxon when there are numerous other third parties with interests in the subject territory who have not been joined as defendants in this matter.

B. STATE OF WISCONSIN'S ARGUMENTS[14]

The State of Wisconsin has moved for summary judgment on several additional grounds. First, it argues that the Chippewa's privileges of occupancy in the land ceded by the 1842 Treaty were extinguished when the United States issued patents for the land to "non-Indian settlers." Since the land was once privately owned, the rights that were terminated when the land was originally conveyed to the settlers should remain terminated even if the state subsequently receives title from a private entity. Wisconsin also claims that it is immune from suit under the

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[14] The State of Wisconsin, at the outset of its brief in support of summary judgment, has set forth reasons encouraging this Court to disregard parts of the *LCO* rulings. However, this Court must follow the decisions of the Seventh Circuit unless it is "powerfully convinced that [the seventh circuit] would overrule [its previous holding] at the first opportunity." *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1123 (7th Cir. 1987). Wisconsin has claimed that a court should not divide privileges of occupancy into habitational and non-habitational components and that removal under the 1842 Treaty was conditioned upon settlement rather than misbehavior. These arguments are directly contrary to the holdings in *LCO I* and *II*, and the Court will not address them further, since they are not supported by law.

Eleventh Amendment, which precludes a party from bringing an action against a state in federal court unless that state has consented to the court's jurisdiction.[15]

C. THE SOKAOGON'S REBUTTAL

In addition to responding to most of the defendants' specific arguments in support of summary judgment, the Sokaogon have claimed that the nature of the evidence relied upon by Exxon necessitates a trial. Most of the Lake Superior Chippewa could not speak or read English, and yet the record is replete with statements attributed to various Native Americans. The Sokaogon suggest that these interpretations are tainted and should be subject to cross-cultural analysis by an ethno-historian.

First, the Sokaogon point out that many interpreters were presumably "interested parties," such as traders to whom the Native Americans may have owed money. Next, even if the interpreter was unbiased, the fact remains that there was a cultural gap between the Chippewa and the government agents, and certain nuances and implications may have been lost in the translation. Exxon's use of the documents is criticized, and the Sokaogon have incorporated expert testimony from one of the *LCO* cases in its response to illustrate the different meanings various interpretations may give to the "unambiguous" words of a petition or a letter.

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[15] The defendant counties have not filed a separate brief; however, some of the defenses raised by Exxon and the State of Wisconsin are applicable to all the defendants, such as whether the 1854 Treaty terminated the privileges of occupancy reserved by the 1842 Treaty.

The Sokaogon have cited to several cases where summary judgment was denied based upon the need for expert testimony at trial. *Technograph Printed Circuits v. Methode Electronics, Inc.*, 356 F.2d 442 (7th Cir. 1966); *Sonobond Corp. v. Uthe Technology*, 314 F.Supp. 878 (D. Cal. 1970). Since Exxon has not shown that it has relied on an expert in its interpretation of the ancient documents in the record, the Sokaogon claim that it has not met its burden under the summary judgment standard.

D. Matters No Longer In Dispute

In its response brief, the Sokaogon have conceded that some of the issues raised in the complaint have been resolved conclusively and on the merits. Exxon has suggested that this Court enter judgment in its favor to prevent the possibility of future litigation about these matters.[16] This Court shall examine the facts presented and determine whether Exxon has shown that there are no genuine issues of material fact that would necessitate a trial.

(1). The Treaty of 1854 Did Not Provide The Sokaogon With a Reservation of Their Own, Nor Was It Intended To Do So

Count Two of the Second Amended Complaint alleged that the government had mapped out and delineated a reservation for the Post Lake Band by 1860, and that dispossession of this land deprived the Sokaogon of the rights and property guaranteed by the 1854 Treaty. The Sokaogon did not dispute the fact that the 1854 Treaty only provides for three reservations in Wisconsin, none of which were granted exclusively to the Post Lake Band. Instead, they claimed that the government induced the Post Lake chiefs to sign the 1854 Treaty by promising them a separate reservation of their own. The subsequent actions of government officials, the Sokaogon added, are in accord with this promise.

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[16] In 1940, this claim was presented to the court of claims, but was abandoned in 1953 without any conclusive determination. *See* Exxon's Reply Brief, 29 n. 2, and citations therein.

Thus the "lost reservation" and "lost map" claims arose. Exxon has acknowledged that these claims are a part of the Sokaogon's lore and are made in good faith; however, it states that the claims are completely contradicted by the actions and intent of United States policymakers at the time the promises were allegedly made and has moved for summary judgment on this claim. Pointing out all the inconsistencies surrounding legends of a "lost reservation" or "lost map," Exxon argues that the Sokaogon's allegations are supported by "a self-contradictory jumble of hearsay, speculation, and conjecture, . . . [which] collapse[s] when analyzed against the historical record." Exxon's Brief at 44.

First, Exxon notes that the 1854 Treaty did not, on its face, provide a reservation for the Post Lake Band. One reservation was clearly set aside along Lake Superior for the La Pointe Band and "such other Indians as may see fit to settle with them." 1854 Treaty, Art. II, § 2. The plain terms of the treaty call for "the other Wisconsin bands" to live on tracts of land set aside near Lac de Flambeau and Lac Courte Oreilles. *Id.* at § 3. There are no ambiguities in the treaty's language that could be construed in favor of the Sokaogon. Furthermore, the alleged promises made by the Commissioner of Indian Affairs, George Manypenny, to Chiefs Me-gee-see and Ne-gig to induce them to sign the treaty should not be accorded great weight, since the 1854 Treaty was executed by two different Indian agents, and Commissioner Manypenny was in Washington, D.C. during the summer of 1854. Finally, even if the Post Lake Band received promises of a reservation, no such promises were clear from the terms of the 1854 Treaty; thus Exxon cannot be subject to these promises.[17]

In addition, Exxon argues that the actions of the United States cannot be construed as setting aside a separate reservation for the Sokaogon. While acknowledging the limited existence of de facto reservations, *Spalding v. Chandler,* 160 U.S. 394 (1896), Exxon has pointed out that the Sokaogon must show "that from what has been done there results a certain defined tract appropriated to certain purposes." *Minnesota v. Hitchcock,* 185 U.S. 373, 390 (1902). The United States must have "affirmatively intend[ed]" to treat the tract as a reservation, *Strong v. United States,* 518 F.2d 556, 563 (Ct. Cl. 1975), and must have "approved" the treatment of the land as a reservation. *Northern Pacific Ry. Co. v. Wismer,* 246 U.S. 283, 288 (1918). The government authority establishing a *de facto* reservation must be competent,[18] and the boundaries of such a reservation must be defined precisely by writing "or by long continued and consented to occupation within well understood contours." *Bouchard,* 464 F.Supp. at 1354.

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[17] If the Sokaogon could have proven that they signed the treaty in reliance on promises made by government agents and those promises were not carried out, they might have had a "moral" claim against the United States. *Indians of California v. United States,* 98 Ct. Cl. 583, 599 (1942). However, they may not pursue this against Exxon.

Exxon has claimed that the Sokaogon have failed to show that the United States has treated the subject territory as a reservation. First, the Sokaogon's claim is contradicted by government policy during the latter half of the nineteenth century. The purposes behind the 1854 Treaty were to open up the interior of Wisconsin for settlement and mining and to "civilize" the Native Americans occupying this land. Although initially, the government intended to situate all the tribes in Northern Wisconsin along the shores of Lake Superior, they finally compromised with the Chippewa and created two interior reservations in response to the demands of the tribes living there. The easiest way for the government to accomplish its goals was to concentrate the Native American population into these relatively small reservations. This would facilitate agents' contact with the tribes, and at the same time reserve the bulk of land in Wisconsin for settlers and miners. In addition, there is evidence that Indian agents tried to convince the interior tribes to relocate to La Pointe and "colonize" with the other Chippewa along Lake Superior. Exxon contends that any arguments by the Sokaogon concerning negotiations for an interior reservation at that point in time are implausible based upon the government's conduct and clear intentions.

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[18] Indian office employees and field agents are not competent to establish reservations without approval from a person with authority. *Northern Pacific Railway Co. v. Mitchell,* 208 F. 469, 472 (D. Wash. 1913).

Furthermore, Exxon has set forth evidence showing that Indian agents would not have promised the Post Lake Band a separate reservation, since many agents believed the tribe belonged on an established reservation. In any case, no one with authority ever approved the Post Lake Band's numerous requests for a reservation. In fact, these requests were rejected expressly at least twice. Exxon's Brief at 70-71. The government never took any steps in recognizing the subject territory as a reservation, such as providing a blacksmith or teachers. Leaders of the Post Lake Band often commented that the government had never set aside a reservation for them.

Finally, Exxon has demonstrated that not even the Sokaogon have presented a consistent set of facts and pleadings. The alleged reservation has never been defined by static boundaries. The size and location of the disputed territory has not remained constant over the years, and there have been times when the "lost reservation" did not include any of Exxon's land.[19] Throughout this case's history, the plaintiff's claims have changed as well. In the original complaint, which did not name Exxon as a defendant, the Sokaogon claimed that they had been promised a reservation, but that one had never been surveyed, nor had boundaries ever been established. Complaint at ¶ 11. The Second Amended Complaint alleged that the reservation "was delimited and mapped by federal officials by the year 1860." Second Amended Complaint at ¶ 24. Because of these inconsistencies and lack of factual support for the Sokaogon's claims, Exxon has moved for summary judgment dismissing the entire portion of Count II.

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[19] In their original complaint, the Sokaogon described boundaries which did not include any part of the Crandon Project.

The Court finds that the Post Lake Band was characterized by Indian agents as a "lost tribe," "stragglers," or "squatters," indicating that the Sokaogon were viewed as trespassers on the lands they occupied, even though they may have claimed this land as their reservation. They never formally received a reservation, nor have they been able to show that one was set aside for them. The clear words of the 1854 Treaty, as well as its intended purpose, have convinced the Court that the only reservations that the government meant to establish were the ones named in the treaty itself. The Sokaogon have not attempted to rebut the evidence put forth by Exxon and have conceded that they no longer have a cause of action on this count. From the undisputed facts presented, the Court finds that the 1854 Treaty did not confer any rights to a reservation upon the Sokaogon and enters summary judgment in favor of the defendants on Count II of the Second Amended Complaint.

(2). THE SOKAOGON HAVE A LIMITED, BUT PROTECTIBLE, INTEREST IN HARVESTING MINERALS CONSISTENT WITH THEIR USUFRUCTUARY PRIVILEGES DEFINED IN THE LCO LITIGATION

Exxon has also asked the Court to find that the Chippewa did not retain any mineral rights under the 1842 Treaty. It claims that the Sokaogon initially asserted that its occupancy rights encompassed the mineral estate under the land, and then later denied these assertions. However, in reading the statements that Exxon has attributed to the Sokaogon, this Court finds that the plaintiffs' claims have been consistent. The "usual privileges of occupancy" retained by the Post Lake Band included mineral rights as long as the Band was making use of those minerals at the time of the treaty. There is some evidence that copper would occasionally be used in religious ceremonies. Although the Post Lake Band was clearly not engaged in extensive commercial mining operations, it is uncontroverted that surface minerals played a part, however minimal, in the tribe's activities.

Contrary to Exxon's assertions, the Sokaogon's answers to interrogatories are consistent with this definition of the "usual privileges of occupancy." In 1987, the Sokaogon claimed an interest in minerals "that were in use or trade amongst the Chippewa before or at the time of the treaty." Exxon's App. at 23. Apparently, these were the minerals that had risen to the surface and were picked up and used by the Chippewa. In another set of interrogatories, the Sokaogon asserted:

> a right of use of minerals, consistent with the needs of occupancy and its traditional usages. To the extent a reservation was or should have been established under the 1854 treaty, it would have vested in the plaintiff beneficial title to the full mineral estate in the twelve mile square area.

Exxon, App. at 74. Although the Sokaogon's asserted interest in minerals is negligible compared to Exxon's, the Court cannot dismiss their rights merely because they were not actively mining and selling copper. Instead, if the Sokaogon's "usual privileges of occupancy" have survived the 1854 Treaty, then it must follow that they have retained whatever rights to the minerals that they had at the time the treaty was signed.[20] For the purposes of this action, the Court will view the existing "usual privileges of occupancy" as including whatever use of surface copper the Chippewa may have exercised circa 1842.

V. ANALYSIS

Having narrowed the issues considerably, Exxon claims that it is entitled to summary judgment on any of a number of grounds. The State of Wisconsin may be entitled to summary judgment on several of Exxon's grounds, and has set forth two additional grounds upon which summary judgment may be granted for it. The Court finds that summary judgment may be granted in favor of all the defendants on the grounds that the 1854 Treaty abrogated the Sokaogon's right to possess and occupy the subject territory. Alternative grounds upon which summary judgment may also have been granted for some or all of the defendants will also be addressed.[21]

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[20] This finding has virtually the same effect as if the Court had adopted Exxon's Conclusion of Law concerning mineral rights, since Exxon has shown that the Post Lake Band rarely took advantage of the subterranean ore body. However, the Court cannot deprive the Sokaogon of the use of minimal amounts of surface copper for religious ceremonies when this use is consistent with other rights reserved to them.

[21] Since these motions may be resolved on the merits, the Court finds that it is unnecessary to address the defendants' procedural defenses. Nor shall it address Exxon's less persua-

A. THE SOKAOGON'S RIGHT TO OCCUPY AND POSSESS THE SUBJECT TERRITORY

At issue is whether the 1854 Treaty extinguished that portion of the Chippewa's "usual privileges of occupancy" that permitted them to "possess and occupy" the ceded land. This Court finds that those rights have indeed been extinguished and that summary judgment should be granted to all of the defendants.[22]

The Court is guided in its decision by the Seventh Circuit's analysis in *LCO I.* When reviewing the district court's decision in *Bouchard,* the Court looked to the circumstances surrounding the 1854 Treaty to determine whether it was intended to abrogate the LCO Band's rights under the 1842 Treaty, since there was no direct guidance from the actual wording of the 1854 Treaty. *Id.* at 362. When this analysis is applied to the facts in the present case, it is apparent that there is a distinction between usufructuary privileges and the right to possess and occupy land under the 1854 Treaty.

In *LCO I,* the Seventh Circuit noted that "the Treaty of 1854 should be held to have abrogated these treaty-

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sive arguments. Furthermore, since it does not have jurisdiction over the State of Wisconsin, it will not consider the State's defense concerning the patenting of land.

[22] This holding in no way affects the final judgment of the *LCO* case, which was limited to the Native Americans' rights to fish, hunt, and gather. These usufructuary rights obviously encompass the right to be present upon the land to a certain degree. This Court merely finds that the Sokaogon's right to assert an interest in the land itself, rather than the fruits of the land, is inconsistent with the purposes behind the 1854 Treaty.

recognized rights only if the 1854 Treaty enactment expressly refers to termination of the usufructuary rights or if the circumstances and legislative history surrounding the treaty make clear that Congress intended such an abrogation." *Id.* at 362. The district court had originally concluded:

> that by the treaty of 1854, the Chippewa surrendered their rights of permissive occupation in the territory ceded in 1837 and 1842, except to the extent that portions of the territory so ceded were to become parts of the reservations provided for in the treaty of 1854.

Bouchard, 464 F.Supp. at 1352. However, the Seventh Circuit reversed this portion of the district court's order and held that the LCO Band's usufructuary rights were unaffected by the 1854 Treaty.[23]

In finding that the Chippewa's usufructuary rights survived the 1854 Treaty, the Seventh Circuit examined the nature of treaty-reserved rights. It noted that usufructuary rights "depend neither on title nor right of permanent occupancy; rather, they are similar to a *profit á prendre." Id.* at 352, citing *Washington v. Washington State Commercial Passenger Fishing Vessel Association,* 443 U.S. 658 (1979). Although the Chippewa realized that they were relinquishing legal title to the land, it was possible that they did not intend to give up all of their treaty-recognized rights and privileges as well. For these reasons, the Seventh Circuit found that the LCO Band did not know that signing the 1854 Treaty would abrogate these usufructuary rights. It also concluded that the government did not clearly intend to extinguish these rights completely. *LCO I,* 700 F.2d at 364.

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[23] Although the district court's ruling pertained to both the right to possess and usufructuary privileges, the Seventh Circuit did not address the former. In a footnote, it remarked:

> The right to "occupy" the ceded lands is not before this court, unless one considers entering onto public lands to exercise usufructuary rights a limited kind of "occupancy." For purposes of these appeals, we will assume the correctness of Judge Doyle's conclusion that the Indians' right to occupy the ceded land was terminated by the Treaty of 1854 . . .

LCO I, 700 F.2d at 362, n. 12. The plaintiffs never appealed the part of Judge Doyle's ruling concerning their occupancy rights on the land.

The Seventh Circuit cited four factors in support of its conclusion. First, while some Lake Superior Chippewa were practicing agricultural techniques used by the white settlers, the majority of Native Americans survived by hunting and gathering, not farming. There was no evidence that the Chippewa would adopt an agrarian lifestyle as soon as the treaty was ratified. In fact, the Chippewa continued to hunt and gather for years after the treaty's provisions were enacted, which the Seventh Circuit cited as its second factor. Third, the Chippewa believed that they were free to exercise their usufructuary privileges as long as they did not harass white settlers, and this belief was supported by the events occurring after the abortive 1850 Removal Order. Finally, the fact that the Minnesota Chippewa had received a reservation of usufructuary rights in the 1854 Treaty suggested that the Lake Superior Chippewa felt that their rights were protected as well. *LCO I,* 700 F.2d at 364.

Usufructuary rights like hunting and fishing imply temporary presence and minimal physical occupation of the land. A person may pass over another's land or use the fruits of that land without asserting any rights to the land. The products taken from the land through hunting, fishing, and harvesting are renewable and will be available on the land for an infinite time as long as those taking the products exercise a certain degree of restraint. Therefore, this Court agrees that the exercise of usufructuary activities is not contingent upon actual ownership of land, since the fee owner retains title and can reap the fruits of his land as well.

In contrast, there is a limited amount of land in the world, and in Wisconsin in the mid-1800's, it appeared to the Native Americans as if they would lose their privileges when others settled upon the land. The Chippewa, including Chief Me-gee-see, recognized that the mere right to occupy would not be sufficient as Wisconsin became more and more crowded with white settlers. In 1853, they sent a "memorial" to the Commissioner of Indian Affairs expressing their desire for reservations of land in order to preserve their nation. The Chippewa expressed their belief that this was the only way for them to acquire "a possession which shall be our own and may not be overflowed by the multitudes who come from your cities and towns to dwell in the forests." Exxon, App. at 1179. The letter also supports the conclusion that they understood that the right to possess and occupy was inconsistent with public and private settlement of land.

The 1842 Treaty did not direct the Chippewa to live in a particular area; rather, it reserved to them their usual privileges of occupancy in the ceded territory. In comparison, the 1854 Treaty specifically directed the Chippewa to live on three reservations in Wisconsin. Unlike the 1842 Treaty, no express rights were retained by the Chippewa under the 1854 Treaty except for this right to live in specific areas and presumably exercise their usual privileges of occupancy. The Seventh Circuit concluded in *LCO I* that the 1854 Treaty's silence as to usufructuary rights resulted in an implied reservation of these rights. There is no similar silence with regard to the Chippewa's right to possess and occupy. Rather, Article 2 of the treaty sets aside and "withhold[s] from sale, for the use of the Chippewas of Lake Superior" three tracts of land. Article 11 calls these lands "homes." Contemporaneous documents attributed both to the government and to the Chippewa clearly indicate that these reservations were meant to be homes for the Chippewa.

Moreover, complete termination of the right to possess and occupy land outside the reserved parcels is consistent with the dual purposes of the treaty – opening up new land for easier settlement and "civilizing" the Native Americans who previously lived on that land. Allowing the Chippewa to inhabit land outside of the reservations would not have served the government's ends. Although the Post Lake Band did not live on a reservation until 1939, they were constantly encouraged to relocate throughout the late 19th and early 20th century. They were not forced off the land, but neither were they granted the land they sought.

Therefore, the terms of the treaty and the circumstances surrounding the treaty, including the government's policy and the Chippewa's understanding, clearly support this Court's finding that the 1854 Treaty abrogated the occupancy rights which were reserved in the 1842 Treaty. Although the Chippewa still retained usufructuary rights on off-reservation lands, the rights to possess and occupy these lands were ceded in return for lands which were thereafter closed to white settlement.

The Sokaogon claim that the 1842 Treaty rights still survive. They have cited to *United States v. Thomas,* 151 U.S. 577 (1894), in support of the contention that the Post Lake Band's right to occupy the ceded territory was still in existence at that time. They also argue that the analysis used in *Bouchard* cannot be applied in this case for two reasons. First, the fact that the Chippewa accepted permanent homes under the 1854 Treaty implies that they recognized that they were giving up occupancy rights in the ceded territory. Secondly, their occupancy rights were held to have terminated once they received the land promised in the treaty, not when the treaty was ratified.

As Exxon has pointed out in its Reply Brief, the Sokaogon's citation to *Thomas* has been taken completely out of context. In *Thomas,* the Supreme Court held that there was no change in the Chippewa's occupancy rights on land that had subsequently become part of a reservation under the 1854 Treaty. Although the treaty may have changed the nature and scope of the Chippewa's off-reservation rights, they still retained those privileges from the 1842 Treaty on their reservations. In contrast, this case concerns the Chippewa's occupancy rights on *non-reservation* land; thus the Supreme Court's holding in *Thomas* is not relevant.

The plaintiff has also attempted to distinguish the LCO Band's reservation history from its own. The LCO Band's reservation, which was at issue in *Bouchard,* did not have its boundaries established until well after the 1854 Treaty was ratified. The Sokaogon contend that they were still negotiating for their reservation well into the 1870's. The fact that they did not receive a reservation under the 1854 Treaty should invalidate the treaty's provisions, since they never benefitted from the bargain entered into with the government when they traded their occupancy rights for the 1854 Treaty reservations. Therefore, the Sokaogon have claimed that their occupancy rights were never terminated.

The term "negotiation" as used by the Sokaogon is ill-chosen. Negotiation implies bargaining in which two parties are willing to make concessions in order to reach a mutually agreeable outcome. The evidence presented by the Sokaogon and Exxon, even when taken in the light most favorable to the non-moving party, does not show that there were ongoing negotiations between the Post Lake Band and government agents. Rather, it proves that the Post Lake Band had hoped that they would be given a reservation apart from those established under the 1854 Treaty. These wishes were expressed to various Indian agents and government officials, but no encouraging responses were ever received from anyone with the authority to negotiate for a reservation. The government never took any affirmative steps in creating a third interior reservation for the Sokaogon until the 1930's.

The Sokaogon were not able to refute Exxon's claim that the United States never established, or intended to establish, a separate reservation for them. Yet, by relying on this "negotiation" argument, they are asking this Court to take as true allegations Exxon has already shown to be speculative at the most. The Sokaogon have admitted that they have no claim to a reservation on the subject territory under the 1854 Treaty. It follows that any negotiations or discussions in which the Post Lake Band engaged could not have resulted in a reservation. To accept the Sokaogon's argument would be to acknowledge that they should have the occupancy rights reserved by the 1842 Treaty until a reservation is established for them, even though they are not entitled to a reservation.

Furthermore, the Post Lake Band did receive a reservation under the 1854 Treaty, even though they were not specifically named as the recipients. Section 3 of Article 2 provides "[f]or the other Wisconsin bands, a tract of land lying about Lac De Flambeau, and another tract on Lac Court Orielles, . . . the boundaries of which shall be hereafter agreed upon or fixed under the direction of the President." The Post Lake Band was a Wisconsin band and could have settled at either of those two reservations. The band's council even acknowledged that they were apportioned the Lac de Flambeau reservation under the 1854 Treaty, but did not wish to move there. *See supra* Exxon App. at 1455-56. Instead, the tribe chose to remain where it had lived in the past, hoping that they would receive a reservation at a future date.

The Sokaogon have argued that their acceptance of the Mole Lake Reservation in 1939 does not extinguish their claim to the 1842 privileges, and they are partially correct. This claim had already been extinguished years earlier.

Although the LCO Band lived on the Lac Courte Oreilles reservation, that reservation was not established solely for their benefit. The only tribe that received a designated reservation under the 1854 Treaty was the La Pointe Band. Even so, the La Pointe Band was required to share its reservation with "such other Indians as may see fit to settle with them." 1854 Treaty, Art. 2, § 2. The fact that one of the reservations had the same name as a Chippewa tribe cannot imply that the reservation was formed for that tribe's exclusive benefit. The Sokaogon have not shown that the LCO Band received greater benefits under the 1854 Treaty than the Post Lake Band. Without evidence to the contrary, the Court must find that the 1854 Treaty granted to the Lake Superior Chippewa two parcels of land in Wisconsin's interior for their permanent homes, and did not specify which bands were to live on which reservation. The LCO Band established itself at the reservation near Lac Courte Oreilles, and their occupancy rights were extinguished when the reservation's boundaries were set. Even though the Post Lake Band never relocated to any of the 1854 Treaty reservations, their occupancy rights must have been extinguished when the boundaries of the last unsurveyed reservation were finalized.

The Post Lake Band may have believed that they were entitled to a reservation, but this belief cannot override the words and circumstances surrounding the 1854 Treaty. The government's intent was all too clear, and the words of the treaty reflect this intention. Native Americans were to make their homes on the reservations in order to grant Indian agents easier access to them. They could leave the reservations to hunt, fish, or gather plants, but they were meant to return to their homes. The right to occupy off-reservation territory is wholly inconsistent with these goals. Therefore, the defendants' motions for summary judgment shall be granted.

B. Privately-Owned Property

Exxon has fee title or mineral or surface rights in ninety-one parcels of land in the subject territory, and has options to purchase land from Forest County and subterranean mineral rights from the Town of Nashville. These interests in land are vital to the success of the Crandon project. The orebody at the heart of the project is located under a small portion of Exxon's land, but adjoining lots were purchased for other activities associated with mining.

In the *LCO* litigation, both the Seventh Circuit and the Western District were absolutely clear as to the Chippewas' usufructuary rights on private property – they were completely extinguished. The Chippewa understood, at the time the treaties were signed, that the lands upon which they exercised their privileges would eventually be used for white settlement. In *LCO II*, the Seventh Circuit held that private lands were not intended to be subjected to the Chippewa's usufructuary rights, since "settlement" was found to be synonymous with "private ownership."

Because the Sokaogon may not hunt, fish, or harvest plants on privately owned property, it follows that they should not be able to occupy it as well.[24] Coming onto property and living there, however briefly, is more invasive than hunting or fishing on that property and suggests an ownership interest rather than a license or *profit á prendre.*

In the *LCO* litigation's final judgment, the district court reiterated the fact that the usufructuary rights of the plaintiff tribes, including the Sokaogon, were limited to lands that were not privately owned. *Lac Courte Oreilles Band v. State of Wisconsin,* 775 F. Supp. 321 (W.D. Wis. 1991). The logical extension of this ruling would limit the Sokaogon from exercising any occupancy rights they may possess on privately owned land. Usufructuary activities can be accomplished through minimal and temporary physical presence on land. To occupy the land necessitates some sort of action asserting ownership, such as the erection of a temporary home. It would be anomalous for this Court to find that the Sokaogon have the right to possess and occupy land upon which they may not hunt, fish or gather.

At the time the treaty was signed, the Chippewa understood that they retained their occupancy rights subject to white settlement. "Settlement," according to the Seventh Circuit, is synonymous with "privately owned land." *LCO II,* 760 F.2d at 182-83. The Sokaogon's predecessors knew that they would be required to remove from ceded lands once settlement of these lands began. *Id.* In any case, the Sokaogon, as parties to the *LCO* litigation, are bound by the final judgment barring usufructuary activities on privately owned land; the Court finds that this bar extends to the right to possess and occupy private land as well.

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[24] Since Exxon plans to purchase land owned by Forest County, it has also noted the portion of *LCO II* which states that any usufructuary rights existing on publicly owned land are extinguished when the land is sold to a private entity. 760 F.2d at 182.

In this respect, Exxon is also entitled to summary judgment with respect to the land and mineral rights it owns in the subject territory. The Seventh Circuit's ruling in the *LCO* litigation, which interpreted usufructuary rights as extending to lands "not privately owned," undeniably excluded privately owned lands as subject to these rights. Exxon is a private corporation and the lands to which it holds title are subject to this ruling.

The Sokaogon have asserted that the distinction between private and public lands discussed in the *LCO* cases is not absolute, and there might exist privately-owned lands upon which they may exercise their usual rights of occupancy. They claim that the Court is not bound by *LCO* for three reasons. First, the land was conveyed by the United States to Exxon's predecessors for "quasi-public" purposes, namely a military wagon road and a railroad. Second, Exxon is distinguishable from a purely private owner because it is a "massive commercial combine." Finally, even if the land is privately owned, there exists an exception to the general rule when a tribe has demonstrated a need for access to a particular piece of property.

None of these arguments presents an arguable issue of fact. First, although the land was originally conveyed for roads and railroads, none of the parties dispute the fact that it is privately owned at present. When a court interprets Native American treaty rights, it must look at the ownership of the land at the time the attempt was made to exercise those rights. Since Exxon is a private entity and currently owns part of the subject territory, the land is privately owned for the purposes of this action. Therefore, these parcels are exempt from any remaining rights the Sokaogon may have in the subject territory.

Second, the fact that Exxon is a "massive commercial combine" is irrelevant. Exxon is a private entity that holds legal title to the land in the same manner as would any individual.[25]

The Sokaogon have culled the "need for access" exception from *LCO II*, 760 F.2d at 182, where the Seventh Circuit held that the mere conveyance of public lands into private ownership might not, by itself, extinguish the Chippewa's usufructuary rights. 760 F.2d at 182. Certain factual situations could conceivably arise in which a court might want to permit the Chippewa to exercise their rights even if the land had, at one time, been patented for private ownership at one time. The court suggested that there may be times when the Native Americans' rights would override the private owners' interests. For example, the Court feared that private landowners would buy public land simply to terminate the Native Americans' rights vested in that land, then reconvey the land back to the state after it had been "laundered." The Seventh Circuit has suggested that a district court conduct a factual examination of the circumstances surrounding the public/private transfer of land, presumably to determine whether the exercise of treaty-reserved rights is consistent with this transfer. *Id.*

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[25] The Sokaogon's illustration does not support a legal exception for "massive commercial combines." The fact that logging companies who abandoned their land have had their interests described as "licenses" does not change the nature of Exxon's legal title to the land.

While the Seventh Circuit did not set forth a bright-line rule for once-private lands, this Court sees fit to interpret *LCO II* as providing an extremely narrow exception to the general rule. This exception should only be invoked where public policy demands a deviation from established legal principles so that justice may be done. If the public is permitted to hunt and fish on private land, forbidding Native Americans from exercising traditional privileges on this land would be manifestly unfair. A court should also discourage "title laundering," where individuals might buy land from public entities to eradicate Native American rights. Both exceptions were mentioned in *LCO II.* In *Lac Courte Oreilles Band v. State of Wisconsin*, 668 F. Supp. 1233 (W.D. Wis. 1987), the district court noted that if the Chippewa were unable to sustain a "modest standard of living" from the fruits of public land, arrangements could be made for them to use private land if they could demonstrate a "particularized need." *Id.* at 1432.

Even if a "need for access" exception exists, the Sokaogon have not demonstrated in this case that they have a particularized need to enter Exxon's property. Although the Sokaogon suggest that land containing ancient burial sites, places of religious significance, and community meeting places are not fungible and thus cannot be compared to lands used for hunting and fishing, they have not presented any evidence that any of these places exist within the subject territory. In fact, of the specific sites named in Fred Ackley's affidavit, none of them are alleged to fall within the ninety-three parcels within the Crandon Project territory.

Assuming *arguendo* that the Sokaogon still had the right to possess and occupy publicly owned lands in the subject territory, this right would extend to the land in Forest County that Exxon is in the process of purchasing. However, these hypothetical rights would not exist indefinitely. The Seventh Circuit made it clear in *LCO II* that property rights are not static and can change once public land is conveyed to a private entity. Therefore, if the Sokaogon had rights of occupancy remaining in the subject territory, these rights would extend to the Forest County parcel. However, once Exxon closes on the parcel, the land's characterization will change from public to private, and the Sokaogon will no longer have any rights of occupancy.

Since Exxon's land is privately owned, the Sokaogon have no right to exercise usufructuary privileges upon it or occupy it. For these reasons, the Court grants Exxon's motion for summary judgment.

C. Removal for the Purpose of Mining

In its motion for summary judgment, Exxon has made a presumptive showing that the intent behind both the 1842 and 1854 Treaties was to open up vast portions of land in Northern Wisconsin and the Upper Peninsula of Michigan for mining. Indeed, the 1842 Treaty was commonly known as the "Miners' Treaty." If the Sokaogon were to prevent Exxon from mining on the subject territory, it would be in contravention of the very considerations prompting the two treaties. Even assuming that the Sokaogon have rights in the land, the language and intent of the 1842 and 1854 Treaties demand that mineral development should take precedence over those rights.

In 1976, the Sokaogon, along with other Chippewa tribes, successfully sued the United States under the Indians Claims Commission Act of 1946, 60 Stat. 1049 with respect to their mineral rights. *Minnesota Chippewa Tribe v. United States*, 37 Ind. Cl. Comm. 146 (Jan. 14, 1976). The Court of Claims found that the consideration given to the Chippewa in 1842 in exchange for the mineral rights to their land was unconscionably low.[26] The Commission recomputed the fair market value of the land at the time of the treaty and paid the tribes any balance owed to them. Because the Sokaogon were already paid for the mineral rights to the land, Exxon claims that they are estopped from asserting any rights to the mineral estate in the subject territory. *See Montana v. United States*, 440 U.S. 147 (1979) ("A right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies." *Id.* at 147.)

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[26] In other words, the Sokaogon have already sold the subterranean mineral rights in the subject territory. They now are seeking, in effect, to enjoin the recovery of these minerals by Exxon, since Exxon would probably be obligated to fence in mining areas for safety considerations.

The Chippewa apparently understood that they were relinquishing any claims they had to lands that would be necessary to the miners. If and when mining commenced on the land, the Native Americans were described as having agreed "to remove to one side," away from land which would be used for activities associated with mining, but not for mining itself. Exxon, App. at 938. The district court, in *Bouchard*, while remarking that the Chippewa might not have understood in 1842 that they were ceding their title to the land, concluded that they did know that they would have "to make way for mining and logging operations." 464 F.Supp. at 1137. Nowhere was there any acknowledgment of a presidential mandate as a prerequisite to removal.

The Sokaogon have not disputed that settlers could ultimately displace Native Americans from ceded territories when mining operations commenced. However, the exact words of the 1842 Treaty in Article VI empower the President of the United States, and no other person, to order the Chippewa to remove. The fact that some Chippewa have agreed to move off ceded land when asked by private owners does not, the Sokaogon contend, waive their right to presidential removal, but rather is evidence of their good nature and acquiescence. Therefore, if they are to be ordered to remove from the land, the Sokaogon demand that there be presidential review of Exxon's "good faith need for exclusion in the interests of mining."

Sokaogon's Response at 25. Exxon states that a contemporaneous construction of the treaty shows that the Chippewa understood that they would vacate the land when the white men came to mine. A presidential removal was necessary only when the Indians refused to leave and harassed the miners. However, the Sokaogon countered that their predecessors' acquiescence and good nature should not be construed as a waiver of their right to the land absent removal by the President of the United States.

Article VI of the 1842 Treaty holds that "[t]he Indians residing on the Mineral district, shall be subject to removal therefrom at the pleasure of the President of the United States." Exxon has presented evidence suggesting that presidential removal was obligatory only if the presence of the Chippewa interfered with the mining operations. This interpretation is supported by both the historical record (evidence that Native Americans acknowledged their obligation to "remove" once mining commenced) and by the fact that presidential removal was never required in previous instances where miners displaced the Chippewa. Although these explicit terms were not in the treaty, the practical construction of a treaty adopted by the parties is entitled to great weight. *Choctaw Nation v. United States,* 318 U.S. 423, 432 (1943). The Chippewa seemed to realize that they had an obligation under the 1842 Treaty, and the Sokaogon have not presented any evidence that this is not so. Therefore, this Court finds that a direct presidential order is not necessary to effect a removal, and the Sokaogon are required to vacate any off-reservation land they have occupied whenever mining commences.

When the Court takes into account the Chippewa's understanding and the history of the 1842 Treaty, it finds that there was an understanding that the ceded lands were to be used eventually for mining and that the Chippewa were meant to vacate the lands when the actual mining began. The Sokaogon had already intervened in the *LCO* litigation as plaintiffs when the district court set forth a comprehensive listing of the Chippewas' usufructuary activities in *Lac Courte Oreilles Band v. State of Wisconsin*, 653 F.Supp. 1420 (W.D. Wis. 1987). Although circa "1837 and 1842, the Chippewa exploited virtually every resource in the ceded territory," harvesting of subterranean minerals is noticeably absent. *Id.* at 1426. Because defining Native American privileges of occupancy demands a consideration of "the history of the treaty, the negotiations, and the practical construction adopted by the parties," *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943), historical events prove that the Chippewa realized the ramifications that mineral development would have on their treaty-reserved rights and nevertheless entered into the 1854 Treaty.

D. SOVEREIGN IMMUNITY

The Eleventh Amendment provides that the "judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." A modern-day interpretation precludes private individuals, corporations, foreign countries,[27] municipalities,[28] and Native American tribes[29] from bringing an action against a state in federal court, unless the state consents to suit or its immunity is abrogated by law or statute. This immunity extends to agencies and officials acting under the authority of the state. *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945). A state may waive its immunity by consenting to a lawsuit, or Congress may provide for private suits against states or state officials through legislation. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). Absent these exceptions, it is clear that neither citizens nor foreign countries or states may sue any of the United States in an action for money damages.

Although many courts have spoken of the Eleventh Amendment as providing "sovereign immunity" to the states, in reality it is a jurisdictional bar. A state is technically not immune from suit by an individual under the Eleventh Amendment, but no federal district court would have proper jurisdiction over such an action. As the Supreme Court noted in *Employees v. Missouri Public Health Department*, 411 U.S. 279 (1973), "[t]he history and tradition of the Eleventh Amendment indicate that . . . a federal court is not competent to render judgment against a nonconsenting State." *Id.* at 284. Because this jurisdictional bar is not absolute,[30] it is necessary to examine the situations under which a state may or may not be sued in federal court.

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[27] *Monaco v. Mississippi*, 292 U.S. 313 (1934).

[28] *Municipal Authority of Town of Bloomsburg v. Pennsylvania*, 496 F.Supp. 686 (M. D. Pa. 1980).

[29] *Blatchford v. Native Village of Noatak*, ___ U.S. ___, 111 S.Ct. 2578 (1991).

Both the State of Wisconsin and the Sokaogon addressed the potential Eleventh Amendment jurisdictional bar before the Supreme Court reached its decision in *Blatchford v. Native Village of Noatak,* ___ U.S. ___, 111 S.Ct. 2578 (1991). In *Blatchford,* a group of Native Americans were precluded from bringing an action for money damages against the State of Alaska. Even though the Supreme Court recognized that Native American tribes are independent sovereigns, *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe,* ___ U.S. ___, 111 S.Ct. 905 (1991), it found no parity between tribes and sister states for the purposes of the Eleventh Amendment. While sister states have mutually consented to waiving their immunity from suits against each other, Native American sovereigns are generally immune to a state's legal actions for damages. To subject a state to a lawsuit while the tribe remains immune would set this system off-balance. The Court limited its holding to actions seeking monetary damages and declined to rule whether a claim for equitable relief would be barred as well. *Id.* at

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[30] For example, the United States or a sister state may bring an action against another state, even when monetary relief is requested or private parties are joined as plaintiffs. *See* 13 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3524 at 124 (1984), citing *Spicer v. Hilton*, 618 F.2d 232 (3rd Cir. 1980); *United States v. State Board of Equalization,* 450 F.Supp. 1030 (N.D. Cal. 1978).

2586.[31] Even though both parties in the instant case were aware that *Blatchford* was pending, neither noted the distinction between legal and equitable relief. However, both types of relief were requested in the Sokaogon's complaint. Although *Blatchford* bars this Court from presiding over the Sokaogon's claim for monetary relief against the State of Wisconsin, there still exists a claim for declaratory judgment. This Court must determine whether this claim is barred by the Eleventh Amendment as well.

First, it is essential to note that *Blatchford* may be distinguished from the case at bar. In *Blatchford*, a state official, rather than the state, was the named defendant. While the Eleventh Amendment's jurisdictional limitations extend to state officials under most circumstances, there are times when a state official may be subject to the district court's jurisdiction when at the same time, the state itself would be immune.

The watershed case of *Ex parte Young*, 209 U.S. 123 (1908), has created a legal fiction which has been roundly criticized and has created a great deal of confusion, yet which serves to check a state's power to enforce unconstitutional laws. In *Young*, a federal district court enjoined the Attorney General of Minnesota from enforcing a state statute which allegedly violated the Fourteenth Amendment. The Supreme Court held that the court's actions did not violate the Eleventh Amendment, since an unconstitutional enactment by a state was "void" and did not "impart to the [state official] any immunity from responsibility to the supreme authority of the United States." *Id.* at 160. In other words, a state may not authorize its employee to act unconstitutionally, the Attorney General was deemed to be "stripped of his official or representative character and subjected in his person to the consequences of his individual conduct." *Id.* Although this type of action is regarded as individual conduct for the purposes of the Eleventh Amendment, it is nevertheless a Fourteenth Amendment violation as well, since the state's unconstitutional conduct is implicated. This inconsistent characterization provides federal jurisdiction through a neat loophole for potential plaintiffs seeking relief against state actions that may be unconstitutional.

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[31] Because the Eleventh Amendment does not immunize counties from suit, this portion of the analysis is not applicable to the three municipal defendants. *See Lake Country Estates v. Tahoe Planning Agcy.*, 440 U.S. 391 (1978) (political subdivisions such as counties and municipalities are not protected by the Eleventh Amendment even though they exercise "a slice of state power." *Id.* at 401).

In cases where an action is brought directly against a state, however, the Eleventh Amendment appears to be given a more literal interpretation, even when the claim involves an issue of constitutional magnitude. The Supreme Court has suggested that a state must be dismissed from a property dispute brought by an individual in *Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982), an admiralty proceeding *in rem*. A private corporation was permitted to serve process on state officials who were holding some artifacts from an abandoned shipwreck pending the outcome of a declaratory judgment action. The Supreme Court held that the State of Florida was not immune from the process because it was served on state officials, not the state itself or one of its agencies. However, the majority opinion by Justice Stevens stated that if the State of Florida had been "named directly in the complaint and ha[d] not consented to the suit, it must be dismissed from the action." *Id.* at 684, citing *Alabama v. Pugh,* 438 U.S. 781, 782 (1978).[32]

Justice White's dissent in *Treasure Salvors* also supports this interpretation.[33] In his view, the State is claiming to own the property, and the purpose of the proceedings is to determine whether the State has title to the sunken treasure. Therefore, the majority's analysis of *Ex parte Young* is misplaced. *Id.* at 702. *Young* and its progeny were intended to apply in cases where the defendants were state officials. A state's own sovereignty in these types of cases is not implicated at all, since the state official "proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." *Ex parte Young,* 209 U.S. at 160. When the sovereign state is actually named in the complaint, however, there is no such analysis that may evade the plain language of the Eleventh Amendment.

In *Treasure Salvors,* it is clear that the Supreme Court assumed that a state may not be named in a complaint without consenting to be sued. Even when the relief requested is declaratory and the complaint alleges violations of the United States Constitution, a state still may not be sued directly absent some indication that it has agreed to waive its Eleventh Amendment immunity. *Alabama v. Pugh,* 438 U.S. 781 (1978), was a conditions of confinement case brought against the State of Alabama by a number of prisoners. Although both the district and circuit courts found that the conditions in the state's prisons violated the Eighth and Fourteenth Amendment, the mandatory injunction that was issued by the district court was invalid against the State of Alabama, since the court was found to have had no jurisdiction over the state as a sovereign entity. *Id.* at 781-82.

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[32] The Court reiterated the same hypothesis later in its opinion as well. *See id.* at 691-92.

[33] Justice White disagreed with the majority's holding that the State of Florida was immune to process when a state official or agency was the named defendant in the action.

It is not clear whether the Sokaogon have a claim of constitutional magnitude against the State of Wisconsin. The dicta of *Treasure Salvors* indicates that a state cannot be named as a defendant in a proceeding to determine a property right. Even assuming that the Sokaogon could advance a takings claim under Section 1 of the Fourteenth Amendment, the holding in *Pugh* demonstrates that an unconstitutional act on the state's part may not waive its immunity. Therefore, whether the State of Wisconsin is accused of a constitutional violation or a mere violation of the terms of a treaty is irrelevant for the purposes of this analysis.

Nor does this Court find that 28 U.S.C. § 1362 circumvents the Eleventh Amendment's jurisdictional proscriptions. Section 1362 provides that "district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe . . . wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." The Supreme Court has refused to find that § 1362 created a legal cause of action against a state official in federal court. *Blatchford*, ___ U.S. at ___, 111 S.Ct. at 2578. Chief Judge Crabb's prescient ruling in the *LCO* litigation is in accord with *Blatchford*. *See Lac Courte Oreilles Band, et al. v. State of Wisconsin*, 749 F.Supp. 913 (W.D. Wis. 1990).

The Eleventh Amendment and the Supreme Court cases interpreting it prevent this Court from exercising any jurisdiction over the Sokaogon's complaint as it pertains to the State of Wisconsin. As long as the State of Wisconsin is named as a party, the Eleventh Amendment precludes the plaintiffs from litigating its treaty rights in this forum. Of course, if this action had been brought against a state official, the Sokaogon would have been able to advance a stronger argument in favor of waiving sovereign immunity. Perhaps the Sokaogon will be able to amend their complaint at a future time to include state officials amenable to suit. However, the Court has no jurisdiction over the part of the complaint naming the State of Wisconsin, since the State of Wisconsin has never consented to this action.

E. ETHNO-HISTORICAL ANALYSIS

Even though the Sokaogon have been unable to establish that there is a specific question of fact concerning their claims which would necessitate a trial, they state that summary judgment is nevertheless inappropriate. Many of the documents relied upon by the defendants, and the Court, are at least one hundred years old. They are admissible as an exception to hearsay under Federal Rule of Evidence 803 (16), and their authenticity cannot be impeached under Federal Rule of Evidence 901 (b)(8), nor do the Sokaogon attempt to do so. However, the Sokaogon have averred that there is a real dispute as to the reliability of these documents, and expert analysis is required to determine the meaning of statements within their historical context.

In support of this argument, the Sokaogon have directed the Court's attention to case law in which "[t]he necessity of expert testimony to translate material, technical facts [was] a justifiable ground for denying summary judgment." *Sonobond Corp. v. Uthe Technology,* 314 F.Supp. 878, 881 (N.D. Cal. 1970), citing *Ortman v. Stanray Corp.,* 371 F.2d 154 (7th Cir. 1967). However, the cases to which the Sokaogon cite are all patent infringement disputes, where the district courts were unable to resolve complex factual issues without expert testimony. For example, in *Uthe,* the alleged misuse of patented technology might not have constituted infringement, since the defendant had used this technology for non-patented activities. The court was unable to determine the extent of these activities, nor could it evaluate damages, without the assistance of experts to present factual evidence.

In contrast, the factual basis of the Sokaogon's complaint concerns events that occurred surrounding the transfer of land by treaty. Although this sort of case is not common, the Court is certainly equipped to interpret treaties and letters written by lay persons in colloquial terms. Indeed, the interpretation of Native American treaties is a question of law and thus amenable to summary judgment. *United States ex rel. Chunie v. Ringrose,* 788 F.2d 638, 643 n.2 (9th Cir. 1986). Moreover, most of the ancient documents upon which this Court has relied are not ambiguous in the least. Even viewing the evidence in the light most favorable to the non-moving party, the Court has found nothing to refute the clear language of the 1854 Treaty and the records surrounding its history. The Sokaogon had the burden of coming forward and showing that the Court's reliance on otherwise admissible documents is misplaced. *Corrugated Paper Products v. Longview Fibre Co.*, 868 F.2d 908, 914 (7th Cir. 1989) (non-moving party bears burden of "shaking" the veracity of opposing party's facts). They have failed to prove the existence of material facts.

The Sokaogon have speculated about different interpretations that several documents might be given, but have not submitted expert affidavits supporting their hypotheses. The only expert named in their brief is Professor Charles Cleland, who testified during the *LCO* litigation. The Sokaogon have provided excerpts of his testimony which discredited documents used in the case because none of the documents were written by the Chippewa and many of the interpreters were biased. However, there is no attached affidavit from Dr. Cleland or any other expert which would cast doubt upon any of the letters, petitions, or records used by Exxon in its motion. A party defending against a motion for summary judgment may not raise a genuine issue of material fact by speculating as to what an expert might say or by relying upon unreasonable interpretations of otherwise clear language. The party "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). These facts may be shown by affidavits, depositions, answers to interrogatories, or admissions on file. **Fed.R.Civ.P.** 56(c). It is apparent that the Sokaogon have not met their burden.[34]

VI. CONCLUSION

For the reasons stated herein, this Court **GRANTS** all of the defendants' motions for summary judgment. The Sokaogon no longer have the right to possess and occupy off-reservation lands within the subject territory; even if these rights had been retained, they would not have been able to exercise them on privately-owned lands or lands associated with mining. Therefore, summary judgment in favor of defendant Exxon is proper.

Moreover, this Court does not have jurisdiction over the portion of the Complaint which purports to state a cause of action against the State of Wisconsin, since it is barred by the Eleventh Amendment. Summary judgment on the merits would have also been granted to the State due to the abrogation of the Sokaogon's right to possess and occupy by the 1854 Treaty.

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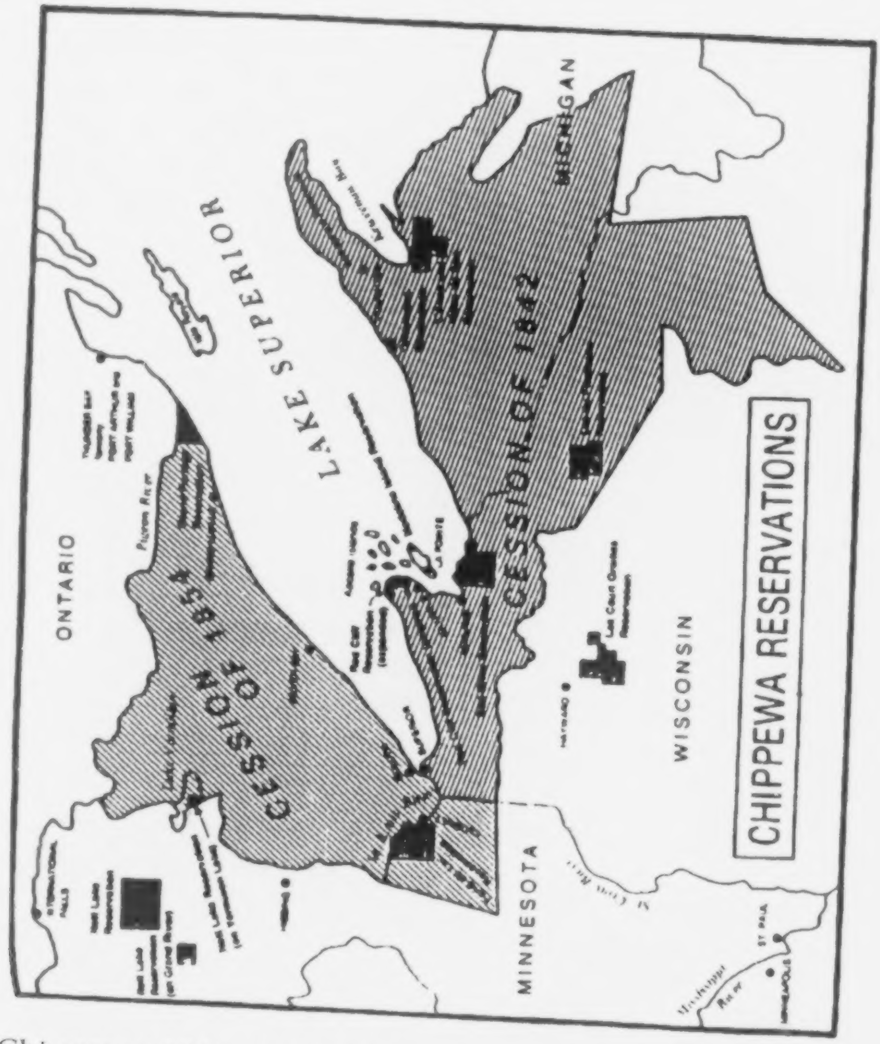
[34] The Sokaogon have attempted to shift the burden of proving the reliability of the ancient documents to the defendants. However, once the documents have been authenticated, they are presumed to be reliable, and the non-moving party questions their reliability, he must bear the burden of impeachment. *See e.g., Corrugated Paper Products*, 868 F.2d at 914. Even when the non-moving party is a Native American tribe, the Court shall still hold firm to this allocation of burdens, since Native Americans' relative disadvantages in dealings with the government are taken into account when interpreting treaties.

SO ORDERED this 29th day of October, 1992, at Milwaukee, Wisconsin.

/s/ Robert W. Warren
ROBERT W. WARREN
SENIOR UNITED STATES
DISTRICT JUDGE


CHIPPEWA RESERVATIONS
ONTARIO
LAKE SUPERIOR
CESSION OF 1854
CESSION OF 1842
MICHIGAN
WISCONSIN
MINNESOTA
Lac Court Oreilles Reservation
Hayward
La Pointe
Red Cliff Reservation
Pigeon River
International Falls
Nett Lake Reservation
St. Paul
Minneapolis
Mississippi River
St. Croix River

Chippewa 1842 and 1854 Treaty Land Cessions

Source: E. Danziger, "They Would Not Be Moved: The Chippewa Treaty of 1854," 43 *Minnesota History* 175-185 (1973), reproduced at p.11, Exxon's Brief in Support of Motion for Summary Judgment, R90:11.

Supreme Court, U.S.
FILED
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No. 93-1223

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SOKAOGON CHIPPEWA COMMUNITY,
Petitioner,

v.

EXXON CORPORATION, a corporation
chartered in the State of New Jersey;
STATE OF WISCONSIN; FOREST COUNTY,
a political subdivision of the State of Wisconsin;
LANGLADE COUNTY, a political subdivision
of the State of Wisconsin; and ONEIDA COUNTY,
a political subdivision of the State of Wisconsin,
Respondents.

**On Petition For A Writ Of Certiorari To The
United States Court of Appeals
For The Seventh Circuit**

RESPONDENT EXXON CORPORATION'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Were the Sokaogon Chippewa Community's so-called "rights of occupancy *per se*" in northeastern Wisconsin extinguished upon the creation of the reservations promised in the Treaty with the Chippewa of September 30, 1854, 10 Stat. 1109, a treaty to which the Sokaogon's predecessors were parties?

2. Was summary judgment appropriately granted against the Sokaogon given that the Sokaogon's predecessors clearly were parties to the 1854 treaty; that the Sokaogon's claim cannot be reconciled with the treaty's plain language; that the claim is at odds with the negotiating history, the surrounding circumstances, and the parties' subsequent construction; and that the claim is grounded upon inadmissible hearsay, innuendo, and conjecture?

LIST OF PARTIES AND RULE 29.1 LIST

The names of all parties to the proceeding in the Court of Appeals appear in the caption of this case. Exxon Corporation has no parent. It holds an interest in numerous entities which are not wholly owned subsidiaries; a complete list of those entities appears on pages 17-30 in the supplemental appendix to this brief in opposition.

On September 13, 1993 (after the Court of Appeals had decided this case), Exxon Corporation conveyed its property interests involved in this litigation to a newly formed Wisconsin general partnership, Crandon Mining Company ["CMC"]. *See* page 1, note 1 below. The following additional information may therefore be pertinent: Crandon Mining Company has four partners—(1) Rio Crandon Inc. and (2) Northwoods Resources Inc., both of which are wholly owned subsidiaries of Rio Algom Limited; and (3) Crandon Mining Company, Inc. and (4) Exxon Minerals Development Corporation, both of which are wholly owned subsidiaries of Exxon Corporation. CMC has no subsidiaries. The undersigned counsel represent CMC as well as Exxon Corporation.

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TREATIES, STATUTES, LEGISLATIVE HISTORY, AND RULES:

Treaty with the Chippewa of October 4, 1842, 7 Stat. 591 ... *passim*

Treaty with the Chippewa of September 30, 1854, 10 Stat. 1109 .... *passim*

Indian Reorganization Act of 1934, § 7, 25 U.S.C. § 467 3

Act of August 30, 1935, 49 Stat. 1049 11

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MISCELLANEOUS:

Atlas of Great Lakes Indian History (H. Tanner ed. 1987) 5, 24

D. Brown, *Bury My Heart at Wounded Knee* (1970) 9

J. Clifton, "Wisconsin Death March: Explaining the Extremes in Old Northwest Indian Removal," 75 *Transactions of the Wisconsin Academy of Sciences, Arts and Letters* 1 (1987) . . . 9

H. Hickerson, *The Chippewa and Their Neighbors: A Study in Ethnohistory* (1970) 9

G. Manypenny, *Our Indian Wards* (1880, republished 1972) . . . 10

W. Warren, *History of the Ojibwa People* (1885, reprinted 1984) . 5

RESPONDENT EXXON CORPORATION'S BRIEF IN OPPOSITION

The respondent Exxon Corporation, by its undersigned counsel, respectfully requests this Court to deny the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit for review of the judgment in *Sokaogon Chippewa Community v. Exxon Corporation*, 2 F.3d 219 (CA7 No. 92-3920, Aug. 12, 1993, *rehearing denied*, Oct. 20, 1993).[1]

TREATY PROVISIONS INVOLVED

The full texts of the Treaty with the Chippewa of October 4, 1842, 7 Stat. 591, and the Treaty with the Chippewa of September 30, 1854, 10 Stat. 1109, are set forth on pages 5-8 and 9-16, respectively, of the supplemental appendix to this brief in opposition.

COUNTERSTATEMENT OF THE CASE

The Sokaogon would have this Court believe that the courts below ignored the relevant historical evidence. (Pet. 9-10.) Nothing could be further from the truth. The District Court and the Court of Appeals issued thoughtful, scholarly opinions that are grounded upon a massive body of historical documentation. This evidence includes thousands of pages drawn from relevant judicial and Indian Claims Commission files; federal, state, and tribal archives; and a variety of published and unpublished primary and secondary sources dating from the 1840s through to the present day.[2] The lower courts' opinions also rest on a comprehensive set of 243 detailed, heavily annotated, *uncontroverted* proposed findings of fact. (*See* R. 91, hereinafter cited without cross-reference as "Findings."[3]) The Sokaogon's claim cannot be reconciled with this 150-year body of evidence.

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[1] As indicated in the Rule 29.1 List, Exxon has, since the Court of Appeals decided this case, conveyed its property interests involved in this litigation to a newly formed Wisconsin general partnership, Crandon Mining Company ["CMC"]. Exxon continues to have a stake in this litigation because (a) it holds a 50% indirect ownership interest in CMC, *see* Rule 29.1 list; and (b) the Sokaogon is seeking damages "for the entire period of dispossession" from the mid-19th century to the present, which would include the period of time that Exxon held title, *see* Second Amd. Cpt., *ad damnum*, R. 36.

In light of the recency of this conveyance, the late stage of this litigation, and Exxon's continued stake in the outcome, neither Exxon nor CMC has thought it necessary to move for a substitution of parties pursuant to this Court's Rule 35. (The undersigned counsel also serve as counsel for CMC.) All counsel of record were advised of this conveyance in September 1993.

A. The Nature And Scope Of The Sokaogon's Claim.

At stake in this case are the rights to "occupy" and "inhabit" 144 square miles of land in northeastern Wisconsin. The location of this so-called "subject territory" is shown in Illustration 1 in the supplemental appendix to this brief; a legal description appears in Findings ¶ 1.[4] The United States granted these lands to the State of Wisconsin and various private parties during the mid-19th century; the lands now are held by hundreds of public, corporate, and individual owners. (Findings ¶¶ 2-12.)

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[2] These materials include a wealth of relevant petitions, correspondence, memoirs, affidavits, depositions, and federal investigative reports from the 1840s through the 1970s. The evidence is reprinted in six volumes appearing at R. 92-96 and 116, and is summarized at length in Exxon's proposed findings of fact (R. 91). The Sokaogon has conceded the authenticity and admissibility of all of this evidence. (*See* App. 80-81; Sokaogon Seventh Circuit Br. at 29.)

[3] The Sokaogon failed to take issue with these proposed findings of fact. Instead, after having been given all of the additional time it had requested to evaluate and respond to this evidence—much of it drawn from the Sokaogon's own archives—the Sokaogon ignored Exxon's proposed findings and submitted three pages of proposed findings of its own, most of which were supported by few if any evidentiary citations. (*See* R. 110.) The Sokaogon's proposed findings did not attempt to join issue with the overwhelming majority of Exxon's proposed findings; those that did were comprehensively addressed and refuted in R. 114. The District Court cited several dozen of Exxon's proposed findings (*see* App. 21-22, 28, 31); both courts below clearly relied on these proposed findings *sub silentio* throughout their opinions.

[4] The Sokaogon and its predecessors have never defined the location, size, or contours of the "subject territory" with any consistency. (*See*

(Footnote continued on following page)

The Sokaogon has a small reservation within the subject territory which was established for its benefit in 1939 by an executive order issued pursuant to § 7 of the Indian Reorganization Act of 1934, 25 U.S.C. § 467. (Findings ¶¶ 13, 241-243.) In addition, the Sokaogon has a treaty-protected "privilege" to engage in off-reservation "usufructuary" activities—hunting, fishing, gathering, and the like—on certain *public* lands. *See* Article 2, Treaty with the Chippewa of October 4, 1842, 7 Stat. 591;[5] *see also Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voight* ["*LCO I*"], 700 F.2d 341, 362-365 (CA7), *cert. denied*, 464 U.S. 805 (1983); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin* ["*LCO II*"], 760 F.2d 177, 178-183 (CA7 1985). The federal courts have held that these usufructuary privileges may not be exercised on private property,[6] and that they also must give way to mining development in cases of conflict. (The whole purpose of the 1842 treaty was to open northern Wisconsin and the Upper Peninsula of Michigan up to mining development; it was known as the "Miner's Treaty"; the Chippewa consistently acknowledged in the years thereafter that they were required under the 1842 treaty "to give place to miners,"

(Footnote continued from previous page)
Findings ¶¶ 137-147.) Indeed, as the District Court observed, the Sokaogon offered two completely different definitions of the subject territory during the course of this litigation alone—one of which (in the original complaint) totally excluded Exxon's property, the other of which (in the Second Amended Complaint) was adjusted to include that property in its entirety. (*See* App. 51; Findings ¶ 146; *see also* Illustration 2 in the supplemental appendix.)

[5] That article provides in relevant part that "[t]he Indians stipulate for the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President of the United States . . . ."

[6] *See LCO I*, 700 F.2d at 365 n.14; *LCO II*, 760 F.2d at 182-183. The final, unappealed judgment in the *LCO* litigation—a judgment binding on the Sokaogon under basic rules of *res judicata* and collateral estoppel —holds that the Chippewas' 1842 treaty rights "have been terminated as to *all portions* of the ceded territory that are privately owned as of the times of the contemplated or actual attempted exercise of those rights." 775 F. Supp. 321, 323 (WD Wis. 1991) (emphasis added).

"remove [to] one side" for mining development, and "not stand in the way of the miners."[7])

Neither the Sokaogon's 1939 reservation rights nor its 1842 treaty usufructuary privileges are at issue in this case. Instead, the Sokaogon here contend that—unlike any of the dozens of other Chippewa bands that were parties to the Treaty with the Chippewa of September 30, 1854, 10 Stat. 1109—it may ignore the reservation system established by the 1854 treaty and instead continue to exercise "rights of occupancy *per se*" anywhere within its "aboriginal and historic home zone of habitation"—even on private lands like Exxon's.[8] The Sokaogon defines these "rights of occupancy *per* se" as "the sheer right to inhabit a place"; it demands "immediate possession of all portions of the subject land occupied or claimed by any defendant," along with damages "for each portion of the subject territory held by any defendant to the exclusion of the plaintiff."[9]

This claim to "occupy" and "inhabit" the "subject territory" grows out of a century-old dispute between the Sokaogon and the federal government involving the Sokaogon's legend of a "lost reservation," to which we now turn. (Findings ¶ 85.)

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[7] Findings ¶¶ 48, 52, 63; *see generally id.* ¶¶ 38-54, 61-67. *See also United States v. Bouchard*, 464 F. Supp. 1316, 1337 (WD Wis. 1978) (the Chippewa understood through the 1842 treaty "that their occupation of certain parts of the territory would be ended to make way for mining and logging operations"), *rev'd on other grounds sub nom. LCO I*; and the District Court's detailed analysis below at App. 19-20, 69-73.

[8] *See* App. 2, 9; Cpt. ¶ 14, R. 1; R. 94, p. 23.

[9] *See* Second Amd. Cpt., *ad damnum*, R. 36; *see also* Sokaogon Seventh Cir. Br. 9, 13. The dramatic scope and implications of this claimed "right to inhabit" are extremely ill-defined, but according to the Sokaogon it includes the right not to be "excluded by fence, published or posted restriction" from enjoying "free movement" through the subject territory; "the right to camp for whole seasons"; "the right to erect and maintain habitations"; and access to certain specific sites historically associated with tribal assemblies, ceremonies, and burials (none of which are anywhere identified as being on Exxon's lands). (*See* R. 116, p. 11; R. 108, p. 9.)

B. The Sokaogon's "Lost Reservation" Legend.

The Sokaogon's predecessors belonged to a Chippewa (more properly, "Anishinabe" or "Ojibwa") tribal division known as the "Chippewas of Lake Superior," which consisted in the mid-19th century of several dozen "bands" scattered throughout the Upper Peninsula of Michigan, northern Wisconsin, and northeastern Minnesota. (Findings ¶¶ 14, 158 n.77.) The principal Chippewa "village-trading post clusters" in the vicinity at issue in this case were located at Lac du Flambeau (about 75 miles to the northwest) and L'Anse (in Michigan's Upper Peninsula about 100 miles to the northeast).[10] The Sokaogon's predecessors consisted of two bands that were offshoots of the much larger Lac du Flambeau and L'Anse communities; they numbered only about 200 in population at the time of the 1854 treaty.[11]

The Sokaogon's predecessors were known variously through the years as the "Post Lake bands," the "Pelican Lake band," the "Rice Lake Chippewa," the "Mole Lake band," the "Lake Bands," and the "Lost Band." (*See* App. 18.) They had their principal villages in the mid-19th century along Post Lake, which lies at the western end of the subject territory, and Pelican Lake, which lies beyond the western border of the territory now being claimed. (Findings ¶¶ 15, 17; *see also* Illustration 1 in the supplemental appendix to this brief.)

It is undisputed that the Sokaogon's predecessors were parties to the 1842 treaty under the "Lake Bands" designation. The 1842 treaty extinguished Native American title to lands legally known as "Royce Area 261" (*see* Illustrations 3 and 4 in the supplemental appendix) and ceded the area to the United States, subject to the provision in Article 2 that "[t]he Indians stipulate for the right of hunting on the ceded territory, *with the other usual privileges of occupancy*, until required to remove by the President of the United States . . . " (emphasis added). The various Chippewa bands initially continued to live throughout the ceded territory, but President Zachary Taylor revoked their "privileges of occupancy" in 1850 and ordered them to remove to Minnesota. Attempts to carry out the removal provoked an outcry from the Chippewa and sympathetic whites; a delegation of Chippewa chiefs traveled to Washington, D.C. in 1852 and reportedly secured President Millard Fillmore's promise to revoke his predecessor's order. (*See* App. 22-24; Findings ¶ 20.)

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[10] *See, e.g., Atlas of Great Lakes Indian History*, p. 146 and Map 27 (H. Tanner ed. 1987); R. 94, p. 659.

[11] *See* App. 3, 9. The leading contemporaneous account, written by a Chippewa, reported in the early 1850s that various "families" had "branched off" from the Lac du Flambeau community and "had commenced to shoot forth new branches or communities." One of these offshoots was identified as "the Pelican Lake band"—the Sokaogon's predecessors. W. Warren, *History of the Ojibwa People* 192, 314-315 (1885, reprinted 1984) (R. 94, pp. 413, 422). Part of the Sokaogon also originated in the Upper Peninsula of Michigan and emigrated to northeastern Wisconsin in the early 1840s. (*See* Findings ¶¶ 16, 223, 233-235.)

The solution to this unsettled state of affairs, as embodied in the 1854 treaty, was to abandon the "removal" policy and instead allow the scattered bands of Lake Superior Chippewa to remain in the region while "colonizing," "concentrating," and "confining" them upon a series of small reservations where, it was hoped, they would abandon their traditional lifestyles and adopt white agricultural methods. (Findings ¶¶ 21, 75-83, 148-161; *see also* pages 17-19 and 24-25 below.) Several bands received reservations of their own, while the others were assigned to larger residual reserves. Three residual reserves were established in Wisconsin: what is now known as the Bad River Reservation, created "[f]or the La Pointe band, *and such other Indians as may see fit to settle with them*," and the Lac du Flambeau [hereinafter "LDF"] and Lac Courte Oreilles [hereinafter "LCO"] reservations, set apart "*[f]or the other Wisconsin bands*." (1854 Treaty, Art. 2 §§ 2-3, emphasis added; *see* Illustration 4 in the supplemental appendix.)

It is undisputed that the Sokaogon's predecessors, then known as the "Post Lake" bands, were represented at the September 1854 treaty negotiations in La Pointe, Wisconsin, by Chiefs Megee-see ("the Eagle") and Ne-gig ("the Otter"). The treaty was styled as a "contract" between the "United States" and the several dozen chiefs and headmen who signed on behalf of their bands, and who agreed collectively to "hereafter be known as the Chippewas of Lake Superior." (Arts. 12-13.) Chiefs Me-gee-see and Ne-gig were among the eleven signatories who placed their sealed marks in the "Lac Du Flambeau" subgrouping of the "Chippewas of Lake Superior." As parties to the treaty, Me-gee-see, Ne-gig, and their bands thereby became entitled to reside on the reservation to be established at Lac du Flambeau (less than 75 miles northwest of Post Lake), or to live on the Bad River or LCO reserves if they preferred. The treaty made no mention of a separate reservation for the "Post Lake" Chippewa, by that or any other name.

The Post Lake Chippewa thereafter recognized that they had rights on the LDF reservation. As the Court of Appeals summarized the historical record:

> "Some of the petitions acknowledge that under the treaty the Post Lake bands were to be treated as part of the Lac du Flambeau band and thus entitled to live on its reservation. They say such things as 'we have a share in the Flambeau reservation'; '[the Post Lake bands] respectfully ask that they may be united with the Bands of Chippewa Indians at Lake du Flambeau . . . just as soon as their Great Father will furnish them the necessary facilities to go to farming'; 'we do not want to move to the Lake Flambeau reservation to which we were apportioned by the treaty of 1854.' " (App. 7; *see also* Findings ¶¶ 24-26.)

The Post Lake bands also were initially counted in with the LDF bands in receiving their annual treaty annuity payments at La Pointe. According to an 1879 petition from them, however, in the late 1850s they held "a council with the Flambeau indians, in which they agreed to divide our payments, & let us draw our share at L'Anse Lake Superior [in the Upper Peninsula of Michigan], as this would be nearer to us" than La Pointe. (Findings ¶ 23; *see* Illustration 4 in the supplemental appendix.) Federal officials acquiesced in this division, and the Post Lake Chippewa thereafter had virtually no contact with the La Pointe Indian

Agency, which was responsible for the Wisconsin Chippewa bands, and instead were ranked within the jurisdiction of the Mackinac Indian Agency, responsible for the Chippewa bands of the Upper Peninsula. (Findings ¶ 23.)

By about 1860, Chiefs Me-gee-see and Ne-gig had begun to claim that they had "rec'd encouragement" from one or more federal officials that they could have their own reservation "in the vicinity of Post Lake." (*Id.* ¶¶ 28, 112.) Their claim continued to be repeated in oral traditions recounted by "several of our old members around Council fires" and "handed down from generation to generation." (*Id.* ¶ 85.) According to these traditions, the then-Commissioner of Indian Affairs, George W. Manypenny, had taken Me-gee-see and Ne-gig aside during the 1854 negotiations and told them "that we would have a reservation in the vicinity of Post Lake, where we could fish, gather Rice & make sugar"; Manypenny made this promise "in order to induce our chiefs of our 2 Bands to sign the treaty," and they had done so on that understanding. (*Id.* ¶¶ 91-92.) Thereafter, the traditions continue, an unidentified federal official visited Me-gee-see "sometime circa 1855-1870," reconfirmed that the Post Lake bands were entitled to their own reservation under the 1854 treaty, and prepared two copies of a "map and other paper" describing the allegedly promised lands, one set of which was left with Me-gee-see and the other taken by the agent "to be made out in regular form and recorded" in Washington. (*Id.* ¶¶ 86, 98.) The agent and his set were lost, the traditions continue, in a shipwreck on the Great Lakes; Me-gee-see's set was stolen by an Indian trader named Billie Johnston. (*Id.* ¶¶ 86, 98-99.) According to the Sokaogon, "[s]everal years afterwards Johnson [*sic*] was taken seriously ill and being advised by his physicians that death was inevitable recollection of this stolen paper came to mind. He then sent word to a friend of his by [the] name of Strauss to whom he entrusted the safekeeping of this treaty [*sic*] . . . ." (*Id.* ¶ 99.) What Mr. Strauss in turn ever did with the "stolen paper" is unknown, because *he* supposedly "committed suicide on a train between Antigo and Clintonville Wis." in either "1896 or 97."

(*Id.* ¶ 106.) The Sokaogon subsequently accused its own lawyers during the 1940s of having stolen the allegedly "lost map" and of refusing to return it; the tribe's counsel denied having any such document, and nothing further ever came of the claim. (*Id.* ¶ 110.)

The full, fascinating, frequently conflicting details of the Sokaogon's "lost reservation" tradition are set forth in Findings ¶¶ 84-147. *See also* App. 5-7, 12, 27-28.[12] Three points are sufficient for present purposes:

First. The "lost reservation" tradition rests upon a demonstrably erroneous factual assertion—that Commissioner Manypenny induced Chiefs Me-gee-see and Ne-gig to sign the 1854 treaty through oral assurances that they would receive their own separate reservation. The uncontroverted evidence shows that this could not possibly have happened because Manypenny was not even *present* for the September 1854 treaty negotiations in La Pointe. (Findings ¶¶ 91-93, 151-161.)

Second. During the 1860s and 1870s, local federal Indian agents repeatedly characterized the Post Lake bands as falling within the "other Wisconsin bands" provision in Article 2, § 3 of the 1854 treaty and as therefore having rights on the LDF or LCO reserves, *not* in the subject territory. (*See id.* ¶¶ 184, 188-189, 191-195.) From Washington, the Office of Indian Affairs unequivocally rejected the Post Lake bands' requests for a separate reservation, instructed them to move to the LDF reserve, and held that "[t]his Department is bound to respect the [1854] treaty as it finds it and can recognize no other reservation than that specified." (*Id.* ¶ 200.)

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[12] We mean no disrespect toward what has obviously been an important legend within the Sokaogon's culture for a century or more, but it must be noted that anthropologists and historians have emphasized that "great caution must be exercised before placing trust" in the factual content of Native American oral traditions—a caution that obviously applies to the oral legends of frontier white culture as well. H. Hickerson, *The Chippewa and Their Neighbors: A Study in Ethnohistory* 33 (1970) (*reprinted in* R. 94, p. 341); *see also* D. Brown, *Bury My Heart at Wounded Knee* xi-xii (1970) (some Native American accounts retold to whites were "tall tales and shaggy-dog stories," and such accounts "must therefore be read with skepticism, although some of them are masterpieces of irony and others burn with outbursts of poetic fury"). One historian who is extremely sympathetic to the Chippewa has noted that claims to allegedly promised reservations were sometimes "an example of Chippewa negotiating style." J. Clifton, "Wisconsin Death March: Explaining the Extremes in Old Northwest Indian Removal," *reprinted in* R. 95, pp. 1021, 1024 n.87. (The final version of this article is published in 75 *Transactions of the Wisconsin Academy of Sciences, Arts and Letters* 1-39 (1987).)

Third. The federal government repeatedly sought during these years to remove the Post Lake bands from the area and to resettle them either on the LDF reservation or on the L'Anse (also known as "Keweenaw") reservation in Michigan's Upper Peninsula. (*See generally id.* ¶¶ 162-200.)[13] These efforts were unsuccessful because the Post Lake Chippewa did not, in the words of one of their petitions, "want to move to the Lake Flambeau reservation to which we were apportioned by the treaty of 1854." (*Id.* ¶¶ 24, 199.) Although the government did not respond with force, these Native Americans remained in the Post Lake vicinity, as the Office of Indian Affairs put it, "without authority" of the United States. (*Id.* ¶ 200.)[14]

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[13] As noted on pages 7-8 above, in the late 1850s the Post Lake Chippewa had been transferred at their own request to the jurisdiction of the Mackinac Indian Agency, responsible for the L'Anse and other Upper Peninsula Chippewa. Several Mackinac agents thereafter thought it would be most expedient for the Post Lake Chippewa to settle on a reservation within Mackinac's jurisdiction. (*See* Findings ¶¶ 189, 197-198.) Even while offering the Post Lake bands the option of moving to "Keweenaw bay" as a matter of administrative convenience, however, the Mackinac Agency confirmed that "[b]y the terms of the treaty of September 30, 1854, 3d clause, article 2d, lands were set apart for them, and other bands, at Lac De Flambeau and Lac Court Oreilles." (Findings ¶ 188.)

[14] The federal government's policy at this time—at least in relatively unsettled areas—was "to employ persuasion instead of military force to bring nomadic Indians upon reservations"; forced relocations to reservations were avoided "so long as they [did] not trouble the whites." ("Foreward" to G. Manypenny, *Our Indian Wards* xiii (1880, republished 1972), *reprinted in* R. 94, p. 470; *see generally* Findings ¶¶ 214-220.)

By the late 19th century the Post Lake Chippewa literally had become, as they often were called, a "lost band"—"wanderers on the face of the earth." (*See id.* ¶¶ 15, 32, 222; *see generally id.* ¶¶ 32-33, 221-243; App. 5-7, 29, 61.) Their status was by no means unique. Because of the frontier character of northern Wisconsin, a lack of sufficient government resources and employees, and Native American resistance to abandoning traditional lifestyles, the Lake Superior Chippewa generally did not settle permanently upon their reservations until close to the turn of the century. "Roaming" Menominee, Potawatomie, Winnebago, and Chippewa bands were scattered throughout the unsettled portions of northern Wisconsin in the late 19th century and in some instances even as late as the 1930s. (Findings ¶¶ 216-218.)

The federal government considered using force to remove the Post Lake bands but ruled that option "out of the question," and instead began at the turn of the century to consider purchasing lands for a small separate reservation for them. (*Id.* ¶¶ 31, 35, 214-220, 227-228.) These efforts culminated in 1939 with the creation by executive order of the reservation now held by the Sokaogon. (*Id.* ¶ 35; *see generally id.* ¶¶ 221-243.)

The following year, the Sokaogon (*sub nom.* "Mole Lake Band") sued the United States in the Court of Claims for damages under a special jurisdictional act, contending that it had been "entitled to have set apart to it for the use and benefit of its members" a separate reservation pursuant to the unwritten "intent" of the 1854 treaty; this claim was abandoned in 1953 as having "no support whatever by evidence."[15] The Sokaogon recovered additional compensation from the United States for other claims under the 1854 treaty in litigation before the Indian Claims Commission during the 1960s and 1970s (*see* page 20 and note 21 below), but did not attempt to resurrect its "lost reservation" claim in those proceedings. *See Sokaogon Chippewa Community v. Wisconsin*, 879 F.2d 300, 301-303 (CA7 1989).

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[15] *See* Findings ¶ 132; *see also Mole Lake Band v. United States*, 126 Ct. Cl. 596, 601 & n.7 (1953); Act of August 30, 1935, 49 Stat. 1049; H.R. Rep. No. 1083 and S. Rep. No. 1208, 74th Cong., 1st Sess. 1-2 (1935).

C. The Proceedings Below.

The United States was the principal defendant in the initial stages of this litigation (commenced in 1986). The Sokaogon contended that the federal government had either intentionally or negligently violated the unwritten intent of the 1854 treaty by failing to establish a separate Post Lake reservation during the 19th century; it sought either an injunction requiring the United States to "deliver possession of the promised reservation" or, in the alternative, money damages for the federal "taking" of these alleged reservation rights. (*See* R. 1.) The Court of Appeals held in 1989 that all of the Sokaogon's claims against the United States are barred on jurisdictional and statute-of-limitations grounds, but it allowed the claims against the other defendants to proceed. *See* 879 F.2d at 302-305. The Sokaogon has not challenged the United States' dismissal from this litigation.

On remand against the remaining defendants, the Sokaogon shifted to an entirely different theory and argued that the United States *had* in fact established a separate reservation for the Post Lake Chippewa in the early years following the 1854 treaty—a reservation that, while subsequently "lost" to them, had created a "beneficial interest akin to fee title" which had never lawfully been extinguished. (*See* Second Amd. Cpt. ¶¶ 21-25, R. 36; *see also* R. 94, pp. 23, 74.) Exxon demonstrated that no such reservation had ever been intended, promised, or established. (*See generally* Findings ¶¶ 148-243.) As the Court of Appeals put it, the "lost reservation" claim "is at best embroidered (too many ransoms, shipwrecks, lost and stolen maps, and deathbed revelations to be plausible) and at worst fictitious." (App. 6.) The Sokaogon conceded that Exxon had refuted the "lost reservation" claim "in conclusive fashion," and the District Court entered a summary judgment holding that "the Treaty of 1854 did not provide the Sokaogon with a reservation of their own, nor was it intended to do so." (R. 112, pp. 3, 29; App. 47; *see generally* App.

47-52.) The Sokaogon does not challenge this portion of the judgment. (Pet. 8-9.)

Having abandoned its "lost reservation" claim, the Sokaogon shifted its focus once again—this time to the 1842 treaty's "privileges of occupancy" clause. The Sokaogon continued to rely upon its "lost reservation" legend in insisting that the unrealized *intent* of the 1854 treaty was to give the Post Lake bands their own separate reservation. Since that never occurred, the Sokaogon now claim, its 1842 treaty "rights of occupancy *per se*" were never technically extinguished and thus remain in force throughout the subject territory. (*Id.* at 9, 11, 15-16.)

The District Court held that Exxon is entitled to summary judgment on this remaining claim for any one of three distinct reasons:

First. Because the Sokaogon's predecessors were parties to the 1854 treaty, their 1842 treaty "rights of occupancy *per se*" in the subject territory were extinguished upon the creation of the Wisconsin Chippewa reservations promised in the latter treaty. (App. 59-60.) The Sokaogon's predecessors were among "the other Wisconsin bands" provided for in Article 2, §§ 2 and 3 of the 1854 treaty, and their refusal to remove to the 1854 treaty reservations in the following decades could not have operated to keep their 1842 treaty "occupancy" rights alive. (*See* App. 55-64.) As for the Sokaogon's 1854 "treaty understanding" argument, the District Court observed that

> "[t]he Sokaogon were not able to refute Exxon's claim that the United States never established, or intended to establish, a separate reservation for them. Yet, by relying on this [treaty understanding] argument, they are asking this court to take as true allegations Exxon already has shown to be speculative at the most. . . . To accept Sokaogon's argument would be to acknowledge that they should have the occupancy rights reserved by the 1842 Treaty until a reservation is established for them, even though they are not entitled to a [separate] reservation." (App. 61-62.)

Second. With two minor exceptions, all of the lands in which Exxon holds interests are privately owned. The Sokaogon's attempted exercise of any of its remaining 1842 treaty "privileges of occupancy" upon these lands would therefore squarely be barred by *LCO*'s private lands rule. (App. 64-69.)

Third. Exxon acquired its property interests in dispute for the purpose of building an underground zinc-copper mine.[16] Because the uncontroverted evidence demonstrates that mining was intended to take priority over the Native American privileges of occupancy reserved in the 1842 treaty, "the Sokaogon are required to vacate any off-reservation land they have occupied whenever mining commences." (App. 69-73.)[17]

The Court of Appeals affirmed. It reasoned that the Sokaogon's remaining claim boils down to the propositions "that either they were not parties to the 1854 treaty and therefore can continue to assert their rights under the 1842 treaty or that, if they were parties, the treaty does not mean what it says." (App. 5.) The Court of Appeals found that neither of these propositions can be reconciled with the 1854 treaty's language, its negotiating history, the surrounding circumstances, or the parties' subsequent construction. (App. 5-14.)

REASONS FOR DENYING THE WRIT

I. IT IS THE SOKAOGON'S CLAIM, NOT THE COURT OF APPEALS' OPINION, THAT IS IN "PATENT CONFLICT" WITH LONG-ESTABLISHED PRINCIPLES OF TREATY CONSTRUCTION.

The Sokaogon asserts that the Court of Appeals' decision "is in patent conflict with century-old principles of treaty interpretation." (Pet. 11.) It argues that the court engaged in a "skewed interpretation" which is "at patent variance with the express terms of the 1854 treaty," "does violence" to this Court's precedents, and "open[s] a significant wound to the structure of the law governing Indian treaty interpretation." (*Id*. at 14-16, 19.)

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[16] Exxon's successor-in-title, Crandon Mining Company, is presently engaged in the process of obtaining the necessary permits and approvals for this proposed mine.

[17] The District Court emphasized that, "[i]f the Sokaogon were to prevent Exxon from mining on the subject territory, it would be in contravention of the very considerations prompting" the 1842 treaty; that treaty "demand[s] that mineral development should take precedence" over the Chippewas' reserved "privileges of occupancy." (App. 70.)

This is completely inaccurate. Both the District Court and the Court of Appeals gave extensive, thoughtful consideration to the canons of Native American treaty construction, emphasizing that "[a]mbiguities and mistakes alike are to be resolved in favor of the Indians," that "Indian treaties are to be interpreted as the Indians themselves would have done," and that the historical record must be treated with caution given the language and cultural barriers between the Chippewa and white people. (*See, e.g.*, App. 7, 10-11; *see also id*. at 36-37.)

It is the Sokaogon's own claim, not the Court of Appeals' decision, that is in conflict with established principles of treaty construction. As the Court of Appeals observed, the Sokaogon's claim rests at bottom on the proposition that "the treaty does not mean what it says"—either because the Post Lake bands were not parties entitled to live on the residual "catch-all" reservations (notwithstanding their chiefs' signatures and the treaty's plain terms), or because the treaty contained a promise "to create a separate reservation" for those bands (notwithstanding that neither the treaty nor any other government document "so much as hints at any such promise"). (App. 5-6.) To get around the treaty language, the Sokaogon has attempted to invoke an array of conjecture, surmise, hearsay, rumor, and innuendo which is flatly contradicted by the uncontroverted historical record; internally contradictory and implausible; and cannot be reconciled with the 1854 treaty language itself. Although *reasonable* doubts are to be resolved in favor of Native Americans, "even Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties." *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943). *See also United States v. Choctaw Nation*, 179 U.S. 494, 538, 541 (1900) (a court may not "disregard the obvious import of the words employed" or "giv[e] to an Indian treaty a meaning not justified by its words").

The Sokaogon's claim also conflicts with established summary judgment standards. Although the petition protests "the injustice of denying these people a trial on their grievance" (Pet. 20), the Sokaogon failed below to demonstrate that there was anything to *try*. The Sokaogon did not attempt to controvert Exxon's detailed findings of historical fact; it relied instead upon inadmissible hearsay, conjecture, and surmise; and it failed to come forward with any expert testimony in support of its claims. As the Court of Appeals emphasized, Exxon, on the other hand, "presented an interpretation of the treaty that was sensible, consistent with and indeed implied by its language, . . . consistent with all reasonably substantiated facts concerning the circumstances in which the treaty had been negotiated and signed," and consistent with "[t]he treaty's purpose, as could be gathered from its words and logic and structure and the background circumstances, and for that matter the subsequent history up to the creation of the Sokaogon's own reservation in the 1930s." (App. 11.)

A party resisting summary judgment "must set forth *specific* facts showing that there is a *genuine* issue for trial." Fed. R. Civ. P. 56(e) (emphasis added). Both of the courts below carefully reviewed the massive historical record and found that, "even when taken in the light most favorable" to the Sokaogon, that record does not contradict, but instead strongly reinforces, the 1854 treaty's clear terms. (App. 61; *see also id*. at 12-14, 34-35.) Thus, even if it were proper to go beyond the treaty's plain language, the historical record "taken as a whole" demonstrates that there are no "genuine" issues as to any "material" facts requiring a trial on the Sokaogon's "treaty understanding" claim. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); Fed. R. Civ. P. 56(c).

II. THE COURTS BELOW CORRECTLY REJECTED THE SOKAOGON'S CLAIM BECAUSE IT CANNOT BE RECONCILED WITH THE 1854 TREATY'S PLAIN LANGUAGE; IS AT ODDS WITH THE NEGOTIATING HISTORY, THE SURROUNDING CIRCUMSTANCES, AND THE PARTIES' SUBSEQUENT CONSTRUCTION; AND IS GROUNDED UPON INADMISSIBLE AND ERRONEOUS HEARSAY, RUMOR, AND CONJECTURE.

The Sokaogon's claim requires consideration of two issues: whether as a general matter the creation of the 1854 treaty reservations extinguished the Lake Superior Chippewas' territorial-wide 1842 treaty "occupancy" rights; and, if so, whether there is any justification to treat the Sokaogon differently from the dozens of other Lake Superior Chippewa bands that were parties to the treaty.

A. The 1854 Treaty Restricted The Lake Superior Chippewas' "Occupancy" Rights To The Reservations Established Under That Treaty.

The whole tenor of the Sokaogon's petition is that the creation of the 1854 reservation system gave rise *at most* simply to an "implication" or "inference" that the Chippewas' 1842 treaty "rights of occupancy *per se*" throughout northern Wisconsin were thereafter restricted to the reservations themselves. (Pet. i, 11, 15, 17.) This conclusion does not simply follow by "implication" or "inference," however—it is inescapable.

The 1854 treaty was plain on its face: the United States "agree[d] to set apart and withhold from sale" several designated tracts of land that would thereafter serve as "the homes" and as the "points . . . for the residence" of "the Chippewas of Lake Superior," and it further promised that "the Indians shall not be required to remove from the homes hereby set apart for them." (Arts. 2, 5, 7, 11.) That the Chippewa would have their future "homes" on certain lands and not on others (which would be put up for "sale" to white people) was thus clear on the face of the treaty itself, thereby serving to abrogate the territorial-wide occupancy rights reserved in the earlier 1842 treaty. As the District Court observed below, the 1854 treaty can only be read as having "specifically directed the Chippewa to live" on the reservations set apart for them. (App. 59.) Otherwise, the whole point of establishing reservations would have been "illusory indeed." *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 358 (1941) (creation of Walapai Indian Reservation extinguished tribal occupancy rights on other lands).

Moreover, the treaty negotiating history and surrounding circumstances underscore the parties' shared understanding that the Chippewas' future occupancy of the ceded territory would be restricted to their new reservation "homes." (*See* App. 3-4, 7-8, 23-26, 58-59.) As described by the Office of Indian Affairs, the underlying policy of the 1854 treaty toward the Lake Superior Chippewa was "to *circumscribe* their limits, and to *concentrate* them upon permanent locations" on a few "small reservations," so that "the efforts made for their improvement will be rendered more effectual." (Findings ¶ 159, emphasis added.) The 1854 treaty was intended to "concentrate," "confine," and "coloniz[e]" the Chippewa "from their scattered localities upon ample reservations." (*Id.* ¶ 158; *see generally id.* ¶¶ 21, 151-161.) The Chippewa themselves recognized that, as a condition of being allowed to remain in the area, their future rights of occupancy would be restricted to their new reservations. (*See id.* ¶¶ 76-79, 151-155.)

This construction also follows inescapably from this Court's interpretation of the 1842 and 1854 treaties in *United States v. Thomas*, 151 U.S. 577 (1894).[18] It is further dictated by the logic

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[18] At issue in *Thomas* was a parcel of land that had been included within the 1842 cession *and* within the boundaries of a reservation established under the 1854 treaty. This Court held that the Chippewas' 1842 occupancy rights had not been extinguished, and that "no change has taken place in their occupancy of the lands, *except as provided by the treaty of September 30, 1854*." 151 U.S. at 582 (emphasis added). Because the 1854 treaty "included the section in question" within a

(footnote continued on next page)

of the federal courts' decisions in the *LCO* litigation concerning the continued survival of the Chippewas' *usufructuary* (but not occupancy) rights on certain public lands.[19]

The Sokaogon now concedes the general proposition "that establishment of a reservation home for a Chippewa Band under the 1854 treaty" did indeed serve to "extinguish[ ] the Band's right of occupancy *per se*" under the 1842 treaty. (Pet. 9.) Indeed, the Sokaogon admitted below that this result is "eminently reasonable" and comports with "common sense"—but *only* as applied to the various Chippewa bands *other* than the Sokaogon. (Sok. Seventh Cir. Br. 20.)

B. There is No Justification For Treating The Sokaogon Differently From The Other Lake Superior Chippewa.

1. The Post Lake Bands' Receipt Of 1854 Treaty Annuities Simply Reconfirms That They Were Parties To, And Thus Bound By, The 1854 Treaty.

The Sokaogon contended below that, unlike the other Lake Superior Chippewa bands, its predecessors "never . . . assented" to the terms of the 1854 treaty, and that it was "not clear" whether they even were "in mind as signatories to the treaty." (*Id.* at 13, 17.) The Sokaogon's petition continues to question whether the Post Lake Chippewa really were "signatories" to the 1854 treaty. (Pet. 6, 9, 15-16.)

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reservation, it "did not operate to defeat the prior right of occupancy to that particular section, but . . . continued it in force." *Id.* at 584. The strong negative inference is that the "prior right of occupancy" *was* "defeated" and was *not* "continued in force" on off-reservation lands. *See also* App. 60.

[19] The Seventh Circuit emphasized in *LCO I* that usufructuary rights are not "inextricably linked" or "dependent" upon rights of actual occupancy, and thus that there is no inherent conflict between restricting Chippewa "occupancy" to the reservations themselves while allowing Chippewa "usufructuary" activities to occur on public property outside of reservation boundaries. 700 F.2d at 352, 363. As the courts reasoned below, the same obviously cannot be said of the rights to "occupy" and "inhabit" the lands that are claimed here. *See* App. 9-12, 55-60; *see also* 700 F.2d at 362 n.12.

It is undisputed, however, that the two principal Post Lake chiefs, Me-gee-see and Ne-gig, were in fact signatories to the treaty. Me-gee-see and Ne-gig themselves acknowledged in 1869 that they had participated in the 1854 negotiations and had executed the treaty; Me-gee-see's son Quing Guish swore in an 1879 affidavit that he too had been present and affirmed that "my father Megesee and Negik the chiefs signed the treaty." (Findings ¶¶ 91-92.) Moreover, the Sokaogon has admitted in its discovery responses that Me-gee-see and Ne-gig entered into the treaty on behalf of their bands. (*See* R. 94, pp. 70-71.)

In addition, Article 4 of the 1854 treaty provided that the Lake Superior Chippewa would receive annuities "for the term of twenty years," and it is undisputed that the Post Lake Chippewa participated in these annuity distributions as "contracting parties" (*see* Art. 13) to the treaty.[20] The Sokaogon also recovered additional money in the 1970s through Indian Claims Commission litigation against the United States on the precise premise that, as a party to the 1854 treaty, it was entitled to further compensation along with the other Lake Superior Chippewa because the original treaty consideration had been "unconscionable" within the meaning of the Indian Claims Commission Act.[21] The Sokaogon is therefore both collaterally and judicially estopped from denying that its predecessors were "signatories" to the treaty who thereby bound themselves to its terms. *See, e.g.*, *Montana v. United States*, 440 U.S. 147, 153 (1979) (collateral estoppel); *In re Cassidy*, 892 F.2d 637, 641 (CA7) (judicial estoppel), *cert. denied*, 498 U.S. 812 (1990).

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[20] *See* Findings ¶¶ 23, 26, 136 & n.62; R. 95, pp. 1501-1505, 1508-1511, 1516.

[21] The Indian Claims Commission originally did not include the Red Cliff, St. Croix, or Sokaogon (then known as "Mole Lake") bands as plaintiffs in the 1854 treaty litigation. *See Minnesota Chippewa Tribe v. United States*, 14 Ind. Cl. Comm. 360, 360-361 (Dec. 8, 1964). In response to a motion from those bands, however, the Commission thereafter amended its earlier findings and found "that these three bands did constitute a part of the Lake Superior Chippewa Tribe" and had claims under the 1854 treaty. *See* 26 Ind. Cl. Comm. 137 (Aug. 11, 1971). The Commission thereafter awarded additional compensation to the collective treaty claimants. *See* 41 Ind. Cl. Comm. 249, 293-294 (Mar. 30, 1978).

The Sokaogon now seizes upon the Court of Appeals' references to the Article 4 annuity payments, noting that those payments were expressly made "[i]n consideration of and payment for" a communal land cession in northeastern Minnesota described in Article 1 of the 1854 treaty. (Pet. 13-15.) The Sokaogon asserts that the court held that simply "by accepting annuity payments under Article 4," the Post Lake bands surrendered their 1842 treaty "occupancy" rights—an interpretation "at patent variance with the express terms of the 1854 treaty." (*Id.* at 14-15.)

The Court of Appeals said no such thing. Instead, the court emphasized throughout its opinion that the Post Lake bands surrendered their *impermanent* 1842 treaty occupancy rights as a *quid pro quo* for receiving *new* rights of *permanent* occupancy in the 1854 treaty reservations:

> "The reservations created a place for the Chippewas to enjoy occupancy rights because they would no longer have such rights off the reservations. . . The treaty's purpose, as could be gathered from its words and logic and structure and the background circumstances, . . . was to extinguish the Chippewa Indians' occupancy rights throughout the ceded (including previously ceded) areas in exchange . . . for occupancy rights in reservations that would be established by the federal government. . . . [O]nce the reservations in which the Sokaogon had rights of occupancy were created, their rights of occupancy under the 1842 treaty . . . ceased." (App. 10-11, 14.)[22]

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[22] The 1842 treaty's occupancy rights were "impermanent" because "[t]he ceded territories were ceded for the purpose of eventual settlement" by whites and thus the Chippewas' 1842 treaty rights "were subject to and limited by the demands of settlers" and "subject to extinction if the lands were needed for settlement." *LCO II,* 760 F.2d at 182-183. The 1854 treaty, on the other hand, guaranteed that the designated reservations would be "set apart and withh[e]ld from sale" and that "the Indians shall not be required to remove from the homes hereby set apart for them." (1854 treaty, Arts. 2 and 11.)

The Article 4 annuity issue is relevant not because the annuities were the contractual "consideration" for the surrender of 1842 treaty occupancy rights, but because the annuities were paid only to those Chippewa bands that were "parties" to the 1854 treaty. The Article 1 land cession, the Article 2 reservation system, and the Article 4 annuity payments all pertained to the contracting chiefs and headmen of the "Chippewas of Lake Superior." The Sokaogon has yet to explain its curious rationale that the Post Lake bands could have been participating "parties" for purposes of Articles 1 and 4, but not for purposes of Article 2. The Court of Appeals committed no error—it was manifestly correct—in concluding that a treaty signatory cannot pick and choose among the treaty's "benefits" and "burdens" that it wishes to accept. (App. 12-13.)

2. The Sokaogon's Claim Is Barred By The 1854 Treaty's Plain Terms, By The Negotiating History, And By The Surrounding Circumstances.

(a) *The plain language*. As signatories to the 1854 treaty, Chiefs Me-gee-see and Ne-gig and their bands acquired the right to live on three different Wisconsin Chippewa reservations. They could move to what is now known as the Bad River Reservation, created "[f]or the La Pointe band, *and such other Indians as may see fit to settle with them*," or they could live on the LDF or LCO reservations, to be set apart "*[f]or the other Wisconsin bands.*" (Art. 2 §§ 2-3, emphasis added.)

The Sokaogon attempts to get around the language underscored above by arguing that these words might not actually have meant what they said; perhaps the Bad River, LDF, and LCO reservations were *restricted* to the bands that actually were living on those designated tracts as of 1854, and *excluded* all of "the other Wisconsin bands." (Pet. 15-16.) But the 1854 treaty said just the opposite. When a reservation promised in the treaty was intended to be restricted to one or more particular Chippewa bands, the treaty plainly and unambiguously said so: there were separate reservations expressly set aside "[f]or the L'Anse and

Vieux De Sert bands" (Art. 2 § 1), "[f]or the Fond du Lac bands" (Art. 2 § 4), "[f]or the Grand Portage band" (Art. 2 § 5), for "[t]he Ontonagon band" (Art. 2 § 6), for "that subdivision of the La Pointe band of which Buffalo is chief" (*ibid.*), and for "the Bois Forte Indians" (Art. 12). The Bad River, LDF, and LCO reservations were the *only* reservations that were *not* restricted to specified Chippewa bands; they would be open to "such other Indians as may see fit to settle" there and "[f]or the *other* Wisconsin bands." (Art. 2 §§ 2-3, emphasis added.)

A court "must take care, when using its power to ascertain the intention of the parties, not to disregard the obvious import of the words employed" or to "giv[e] to an Indian treaty a meaning not justified by its words." *United States v. Choctaw Nation*, 179 U.S. 494, 538, 541 (1900). Yet as the Court of Appeals emphasized below, that is the whole premise of the Sokaogon's case—that "the treaty does not mean what it says." (App. 5.) The Post Lake bands clearly were "other Indians" and "other Wisconsin bands" that were not assigned to their own separate reservation. The Sokaogon's argument that its predecessors were somehow exempt from the treaty because the treaty did not "expressly" assign them to a particular reservation cannot be squared with the treaty's express "catch-all provisions." (*See generally* App. 8-9, 11-12, 48-49, 62.) Quite simply, as the District Court concluded, "[t]here are no ambiguities in the treaty's language that could be construed in favor of the Sokaogon." (App. 48-49.)

The reservations specified above were the only reserves promised in the 1854 treaty as executed by the Chippewa, approved by the President, and ratified by the United States Senate. There is not even a hint of a separate "Post Lake Reservation" by that or any other name. The Sokaogon's claims that its predecessors were either somehow exempt from the treaty's provisions or were orally promised an additional reservation of their own are accordingly barred. Although ambiguities in treaty language generally are construed in the Native Americans' favor, this Court repeatedly has emphasized that "even Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties." *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943).[23]

(b) *The historical record*. The negotiating history and surrounding circumstances further refute the Sokaogon's theory that the 1854 treaty can somehow be read as providing that "[e]ach" of the Wisconsin Chippewa bands would be given its own reservation "on its home ground, or drawn to its selection, and would not be required to remove from its home precincts." (Pet. 16.) This argument completely mischaracterizes history and ignores the treaty's underlying purposes. Twenty-three separate bands of Lake Superior Chippewa were present for the treaty negotiations —bands that were scattered throughout northern Michigan, Wisconsin, and Minnesota, including on the headwaters of the Wisconsin, Chippewa, St. Croix, and Wolf Rivers. (*See* Findings ¶ 158 n.77; *see also* page 5 and notes 10-11 above.)[24]

Thus, contrary to the Sokaogon's claims, many other Lake Superior Chippewa were required to "relocate" to the reservations specified in the treaty. As shown above, that was the whole point of the compromise struck in the treaty: the Chippewa would be allowed to remain in the area, but the United States would "*circumscribe* their limits," "*concentrate* them upon permanent locations," and "*coloniz[e]* them from their scattered localities" onto the designated reservations. (*See* pages 6-7 and 17-19 above.) It is the Sokaogon that is seeking to be treated unlike other treaty signatories—not the other way around. *See also* the Court of Appeals' analysis of the negotiating history at App. 8.[25]

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[23] *See also South Carolina v. Catawba Indian Tribe, Inc.* 476 U.S. 498, 506 (1986) ("The canon of construction regarding the resolution of ambiguities in favor of Indians . . . does not permit reliance on ambiguities that do not exist . . ."); *Oregon Department of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985) ("courts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' . . . clearly runs counter to a tribe's later claims"); *DeCoteau v. District County Court for the Tenth Judicial District*, 420 U.S. 425, 447 (1975) ("A canon of construction is not a license to disregard clear expressions of tribal and congressional intent"); *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 353 (1945) (in construing a treaty, "[w]e stop short of varying its terms to meet alleged injustices"); *United States v. Choctaw Nation*, 179 U.S. at 535-536, 538, 541.

[24] *See also Atlas of Great Lakes Indian History*, p. 146 (H. Tanner ed. 1987) ("In northern Wisconsin and western Upper Peninsula Michigan" in the mid-19th century, "Ojibwa numbering about 3,800 were distributed among . . . 35 principal locations in the subject area").

The Sokaogon's "treaty understanding" and "lost reservation" arguments cannot prevail in the face of the plain treaty language and the massive historical record "taken as a whole." *Matsushita*, 475 U.S. at 587. To begin with, the whole foundation of these arguments is the contention—first advanced by Chiefs Me-gee-see and Ne-gig in 1869—that Commissioner Manypenny had induced them to sign the 1854 treaty through oral assurances that they would receive their own reservation "in the vicinity of Post Lake." (Findings ¶¶ 91-93, 156.) This could not possibly have happened because, as an examination of the negotiating records and Manypenny's office files reveals, Manypenny was not even *present* at La Pointe for the treaty talks. (*Id.* ¶ 157; *see also* App. 6, 49.)[26]

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[25] The Sokaogon thinks it significant that the Post Lake bands were not separately designated as such in the 1854 treaty, as they had been in the 1842 treaty (*sub nom.* "Lake Bands"), but instead were grouped with others under the "Lac Du Flambeau Band" sub-heading. (Pet. 6, 9, 15-16.) The same thing can be said of many other Chippewa bands separately identified in the 1842 treaty but grouped together with other bands in the 1854 treaty, including the "Wisconsin River," "St. Croix," "Chippewa River," "Snake River," "Mille Lac," "Po ke gom maw," "Red Ceder Lake," "Gull Lake," "Sandy Lake," and "Crow-wing River" bands. Under the Sokaogon's logic, these bands also would be exempt from the 1854 treaty's extinguishment of the Chippewas' "rights of occupancy *per se*." The much more natural construction is to read the 1854 treaty as having grouped the various bands together according to the reservations upon which they were expected to live in the future.

[26] Manypenny and Me-gee-see did meet *after* the treaty had been ratified, during the 1855 annuity distribution in La Pointe. According to an observer, Me-gee-see complained "that his band were unprovided for, and without any right of location upon any of the reservations"; in response, Manypenny "directed him to come to his office after council; *what was done we did not learn.*" (Findings ¶ 173, emphasis added.) The

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Moreover, although the Post Lake bands sometimes claimed to have the "understanding" that they were entitled to their own reservation, at other times they clearly expressed the "understanding" that they *did* have rights on the residual "catch-all" reserves. *See* page 7 above; App. 7, 26-27, 62. One petition, for example—signed by 17 of the bands' elders and written after they had heard that the LDF reservation might be sold—unambiguously asserted:

> "We do not want to move to the Lake Flambeau reservation to which we were apportioned by the treaty of 1854 . . . . At the same time, we do not want to give up our interests in the Lake Flambeau reservation, if it should be sold, as by that treaty of 1854 we are numbered in with the Lake Flambeau Indians." (R. 95, pp. 1455-1456; *see also* Findings ¶¶ 24, 199.)

As the Court of Appeals emphasized, "[t]he oral tradition of a promised reservation is not *evidence*, that is, evidence admissible in a court of law, which is what Fed. R. Civ. P. 56 explicitly requires in order to create a triable issue." (App. 12, emphasis in original.) The treaty is not simply another piece of evidence to be balanced on a scale against oral legends and speculative inferences. It is *the* controlling law. To be sure, admissible evidence may be used in construing ambiguities in treaty language, and

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Sokaogon argued below that the fact that Manypenny decided to discuss the matter in "private discussion" with Me-gee-see rather than debate it in front of the other chiefs shows that Me-gee-see's remark must have had "serious" merit. (Sok. Seventh Cir. Br. 18 n.7.)

This is nothing more than rank speculation and conjecture. The same observer wrote that Me-gee-see "was not well spoken of by his neighbors" and that Ne-gig "was considered a great rascal"; perhaps Manypenny simply did not want to spend time during his meeting with the entire council discussing these particular chiefs' alleged grievances. (Findings ¶ 173.) There is certainly no plausible basis to speculate that Manypenny might have told Me-gee-see in "private discussion" that the treaty Me-gee-see had signed just the previous year did not mean what it said. (*See id*. ¶¶ 174-179.) And even if he had, Me-gee-see obviously could not have signed the treaty in 1854 in reliance on a "private discussion" with Manypenny that had not yet taken place.

uncertainties should be resolved in the Native Americans' favor —"within the bounds of reason of course." (App. 10.) But as the Court of Appeals concluded, here the relevant treaty terms are "unambiguous" and provide "no textual handle" for the Sokaogon's claims. (App. 7, 9.)

3. The Post Lake Bands' Refusal To Remove To A Reservation, And The Federal Government's Decision Not To Use Force Against Them, Did Not "Revive" Their Previous "Occupancy Rights."

The Sokaogon asserts that the Court of Appeals concluded that, even if the Post Lake bands received *no* reservation rights *anywhere* under the 1854 treaty, they *still* lost their 1842 treaty occupancy rights because they neglected over the years to make "explicit statements" of belief that their 1842 rights remained in effect. (Pet. 17; *see generally id.* at 16-19.) The court below did no such thing. Although it made the accurate factual observation that the Sokaogon's post-1854 petitions and claims did not invoke the 1842 treaty, *see* App. 13-14, nowhere in its decision did it ever suggest that this was a controlling consideration.

Nor did the court anywhere hold that the Sokaogon's 1842 treaty occupancy rights were extinguished even if "the Post Lake Band was not provided with a reservation under the 1854 treaty." (Pet. 17.) To the contrary, the court made clear at the outset that it was assuming, solely for the sake of decision, that the 1842 treaty occupancy rights survive intact to this day *unless* those rights were "surrendered" through the 1854 treaty. (App. 2-3.) The rest of the decision was devoted to demonstrating that this was precisely what had happened. The very paragraph containing the "explicit statement" language that the Sokaogon now criticizes concludes that the 1842 treaty occupancy rights were extinguished, not because of the Sokaogon's failure to make "explicit statements," but because "reservations in which the Sokaogon had rights of occupancy were created" under the 1854 treaty. (App. 14.)

The Sokaogon also finds significance in the fact that the Post Lake bands remained in the area in the decades following the 1854 treaty, and asserts that "the United States did not seek to remove them" during this time. (Pet. 19 n.4.) The latter contention is false. Federal Indian agents repeatedly characterized these bands during the 1860s and 1870s as falling within the "other Wisconsin bands" provision in Article 2, § 3 of the 1854 treaty, and as therefore having rights on the LDF or LCO reserves, *not* in the subject territory. (*See especially* the field reports quoted in Findings ¶¶ 184, 188, 193, 195.) The Mackinac Indian Agency sometimes sought as a matter of convenience to remove the Post Lake Chippewa to the L'Anse Reservation since they had been transferred at their own request to that agency's jurisdiction, but that agency likewise emphasized that they had no right to remain where they were and that they properly fell within "the terms of the treaty of September 30, 1854 3d clause, article 2d." (*Id.* ¶ 188; *see also* page 10 and note 13 above.) The Post Lake Chippewa were consistently viewed as "a strageling [*sic*] portion of the Tribe that ha[d] wandered off" and "refuse[d] to leave their old homes." (Findings ¶¶ 188, 198.)

This also was the view of the Office of Indian Affairs, which twice rejected the Post Lake Chippewas' requests for their own separate reservation—once in 1864 and again in 1880. (*Id.* ¶¶ 89, 190, 199-200.) That agency unambiguously held that they fell within the "other Wisconsin bands" provision in Article 2, § 3; that they belonged on the LDF reservation but "have *without authority*, seen proper to isolate themselves from their brethren"; that they were required under the treaty to "betake themselves to the reservation provided for them"; and that "[t]his Department is bound to respect the treaty as it finds it and can recognize no other reservation than that specified." (Findings ¶ 200, emphasis added.) This construction of the 1854 treaty by the executive department charged with its implementation is entitled to "great weight." *Dennison v. Topeka Chambers Industrial Development Corp.*, 527 F. Supp. 611, 622 (D. Kan. 1981), *aff'd*, 724 F.2d 869 (CA10 1984); *see also Russ v. Wilkins*, 624 F.2d 914, 922-923 (CA9), *cert. denied*, 451 U.S. 908 (1981).

Subsequent official investigations during the early 20th century simply reconfirmed, in the words of the Office of Indian Affairs, that "[t]he so-called lost band of Chippewa Indians of Wisconsin" had "refused to remove to the Lac du Flambeau Reservation"; they had "not received allotments [of land] because of their refusal to remove to the reservation set apart for their band." (Findings ¶ 240.) The Solicitor of the Department of the Interior likewise concluded from his investigation that these Native Americans were landless because they had "persisted in their refusal to be located upon the reservations of other Chippewa in Wisconsin." (*Id.* ¶ 243.)

The federal government's decision for practical and humanitarian reasons not to inflict a forced removal creates no inference whatsoever that the Post Lake bands had continuing 1842 treaty occupancy rights in the disputed area. As the Court of Appeals emphasized, while

> "the government decided not to use force against the Post Lake bands . . . it never acknowledged their right either to remain where they were living or to have a reservation created specially for them. It took the position that they were bound by the 1854 treaty, that the government had performed its treaty obligations to them by creating reservations that they had a right to occupy, and that they were merely squatters on the land on which they continued to live." (App. 6-7.)

See Healing v. Jones, 210 F. Supp. 125, 147-148 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963); *see also id.* at 174 ("Actual use and occupancy of land, without more, has no connotation of rightful possession. A trespasser may have actual use and occupancy of land"). *See generally United States v. Southern Ute Tribe*, 402 U.S. 159, 169, 171 (1971) (*re* interpretation of bilateral agreement incorporated into statute) ("We do not doubt that the Southern Utes regarded the lands they occupied as 'our reservation,' but we fail to see how this nullifies . . . [the] cogent evidence that the United States totally rejected the Indians' claim that the strip was 'our reservation' "); *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 180 (1947) ("We cannot, under any accept-able rule of interpretation, hold that the Indians owned the lands merely because they thought so").[27]

CONCLUSION

For all of the foregoing reasons, the respondent Exxon Corporation respectfully submits that the petition for a writ of certiorari should be denied.

Dated this 22nd day of February, 1994.

Respectfully submitted,

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**Counsel of Record*

Attorneys for Respondent
Exxon Corporation

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[27] The 140-year-old "lost reservation" dispute has fundamentally been between the United States and the Sokaogon, not innocent third parties like Exxon. The federal government has consistently rejected the Sokaogon's claim through the generations, and it granted the subject territory to white settlers as "vacant and unappropriated lands" that had been found "to be free from conflict." (Findings ¶ 208; *see generally id.* ¶¶ 162-243.) Thus, even *if* the government broke an unwritten promise to the Sokaogon, the remedy at this late date would be for damages against the United States, not for the seizure of lands held by innocent third parties. *See United States v. Creek Nation*, 295 U.S. 103, 110-111 (1935); *Yankton Sioux Tribe v. United States*, 272 U.S. 351, 357, 359 (1926); *Navajo Tribe v. New Mexico*, 809 F.2d 1455, 1467 (CA10 1987); *Confederated Salish & Kootenai Tribes v. United States*, 185 Ct. Cl. 421, 401 F.2d 785, 786 (1968), *cert. denied*, 393 U.S. 1055 (1969).

No. 93-1223

In The

Supreme Court of the United States

OCTOBER TERM, 1993

SOKAOGON CHIPPEWA COMMUNITY,

Petitioner,

v.

EXXON CORPORATION, a corporation
chartered in the State of New Jersey;
STATE OF WISCONSIN; FOREST COUNTY,
a political subdivision of the State of Wisconsin;
LANGLADE COUNTY, a political subdivision
of the State of Wisconsin; and ONEIDA COUNTY,
a political subdivision of the State of Wisconsin,

Respondents.

**On Petition For A Writ Of Certiorari To The
United States Court of Appeals
For The Seventh Circuit**

SUPPLEMENTAL APPENDIX TO RESPONDENT EXXON CORPORATION'S BRIEF IN OPPOSITION

SUPPLEMENTAL APPENDIX

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Illustration 3: Wisconsin Indian Cessions To United States. (Source: *Eighteenth Annual Report of the Bureau of American Ethnology to the Secretary of the Smithsonian Institution,* 1896-97, J.W. Powell, Director, Part 2, *reprinted as* H.R. Doc. 736, 56th Cong., 1st Sess. (1899).) A-3

Illustration 4: Reservations Created Pursuant To 1854 Treaty. (Source: Full citation in caption of illustration.) A-4

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

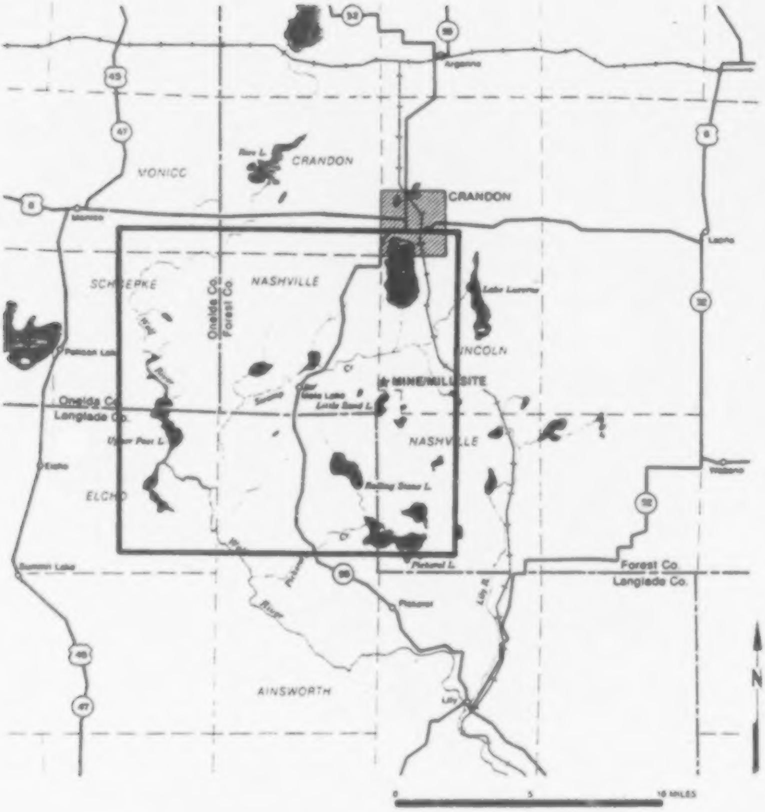
CRANDON
Rice L.
MONICO
Monico
CRANDON
Argonne
SCHOEPKE
NASHVILLE
Oneida Co.
Forest Co.
Lake Lucerne
Laona
LINCOLN
MINE/MILL SITE
Pelican Lake
Oneida Co.
Langlade Co.
Little Sand L.
Upper Post L.
NASHVILLE
Elcho
ELCHO
Rolling Stone L.
Wabeno
Summit Lake
Pickerel L.
Pickerel
Forest Co.
Langlade Co.
Lily R.
AINSWORTH
Lily
N
0
5
10 MILES

ILLUSTRATION 1

LOCATION OF "SUBJECT TERRITORY"

AREA CLAIMED BY SOKAOGON SHOWN IN HEAVY RED LINE

SOURCE: Adapted from Wisconsin DNR, Crandon Project FEIS, Figure 1-1 (1986). (Full cite and record source in the Table of Contents to this Supplemental Appendix.)

CRANDON
WISCONSIN

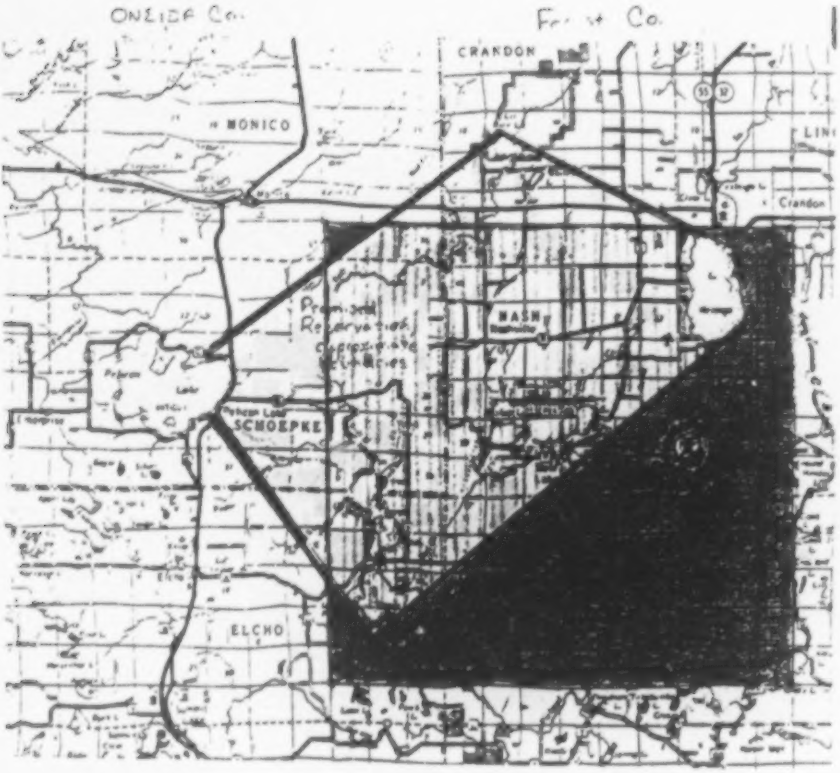
ONEIDA Co.
Forest Co.
CRANDON
MONICO
Crandon
55
32
Proposed Reservation Approximate Boundaries
SCHOEPKE
Pelican Lake
ELCHO

ILLUSTRATION 2

THE TWO "LOST RESERVATIONS" CLAIMED IN THIS LITIGATION

The black-and-white portion of this Illustration is a copy of the map attached to the Sokaogon's original June 5, 1986 Complaint. (*See* R. 1.) The reservation claimed in that complaint is shaded in yellow. The reservation claimed in the Second Amended Complaint is shaded in blue, corresponding to the map produced by the Sokaogon in 1987. (*See* R. 94, pp. 17-18.) The location of Exxon's orebody is shown by the red star. (Record source in the Table of Contents to this Supplemental Appendix.)

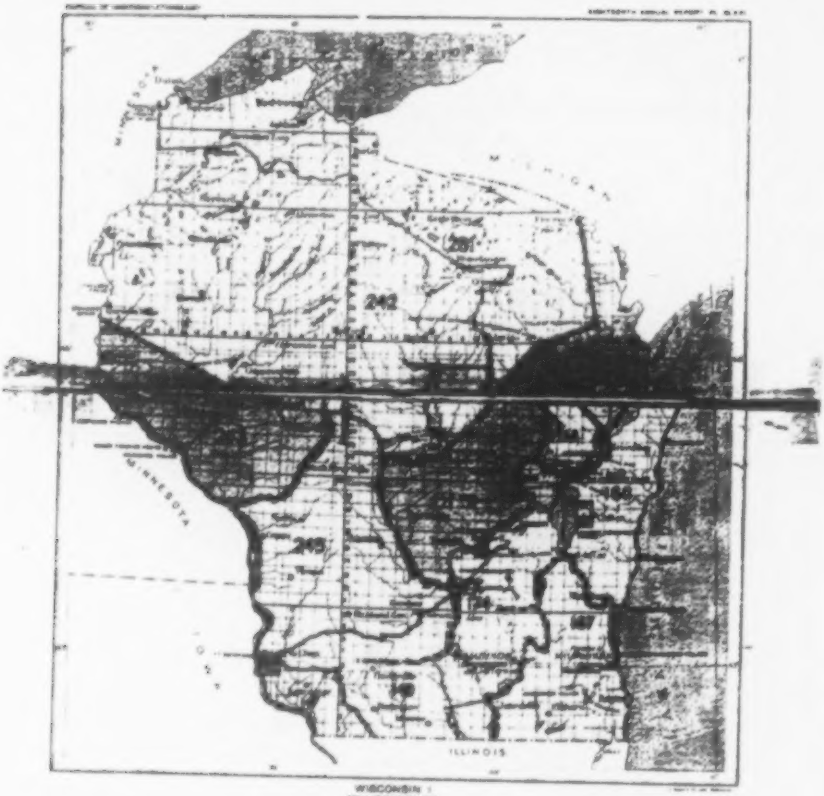
MICHIGAN
MINNESOTA
MINNESOTA
ILLINOIS
242
261
WISCONSIN 1

ILLUSTRATION 3

WISCONSIN INDIAN CESSIONS TO UNITED STATES

SOURCE: Bureau of American Ethnology, 1896-97.
(Full cite and record source in the Table
of Contents to this Supplemental Appendix.)

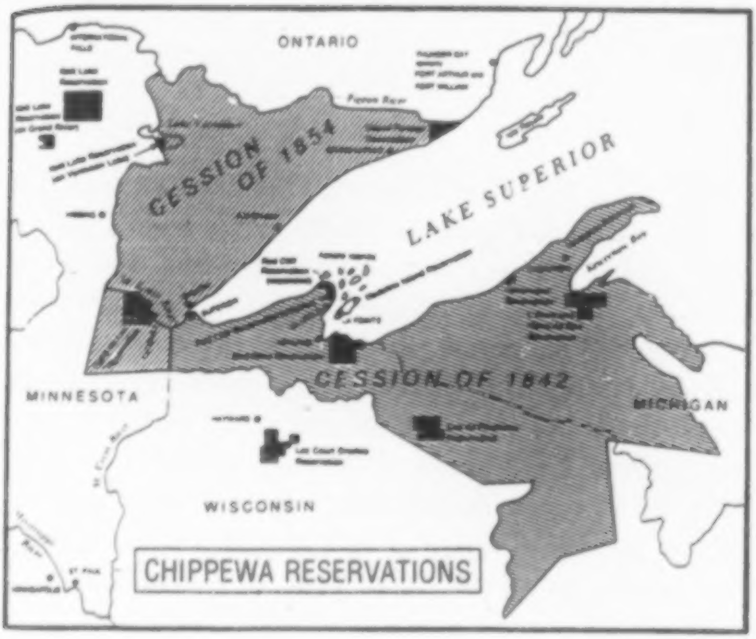
ONTARIO
CESSION OF 1854
LAKE SUPERIOR
CESSION OF 1842
MINNESOTA
MICHIGAN
WISCONSIN
CHIPPEWA RESERVATIONS

ILLUSTRATION 4

RESERVATIONS CREATED PURSUANT TO 1854 TREATY

SOURCE: E. Danziger, "They Would Not Be Moved: The Chippewa Treaty of 1854," 43 Minnesota History 175-185 (1973). (Record source in the Table of Contents to this Supplemental Appendix.)

TREATY WITH THE CHIPPEWA OF OCTOBER 4, 1842

7 STAT. 591

Articles of a treaty made and concluded at La Pointe of Lake Superior, in the Territory of Wisconsin, between Robert Stuart commissioner on the part of the United States, and the Chippewa Indians of the Mississippi, and Lake Superior, by their chiefs and headmen.

ARTICLE I.

THE Chippewa Indians of the Mississippi and Lake Superior, cede to the United States all the country within the following bounderies; viz: beginning at the mouth of Chocolate river of Lake Superior; thence northwardly across said lake to intersect the boundery line between the United States and the Province of Canada; thence up said Lake Superior, to the mouth of the St. Louis, or Fond du Lac river (including all the islands in said lake); thence up said river to the American Fur Company's trading post, at the southwardly bend thereof, about 22 miles from its mouth; thence south to intersect the line of the treaty of 29th July 1837, with the Chippewas of the Mississippi; thence along said line to its southeastwardly extremity, near the Plover portage on the Wisconsin river; thence northeastwardly, along the boundery line, between the Chippewas and Menomonees, to its eastern termination, (established by the treaty held with the Chippewas, Menomonees, and Winnebagoes, at Butte des Morts, August 11th 1827) on the Skonawby river of Green Bay; thence northwardly to the source of Chocolate river; thence down said river to its mouth, the place of beginning; it being the intention of the parties to this treaty, to include in this cession, all the Chippewa lands eastwardly of the aforesaid line running from the American Fur Company's trading post on the Fond du Lac river to the intersection of the line of the treaty made with the Chippewas of the Mississippi July 29th 1837.

ARTICLE II.

The Indians stipulate for the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President of the United States, and that the laws of the United States shall be continued in force, in respect to their trade and inter course with the whites, until otherwise ordered by Congress.

ARTICLE III.

It is agreed by the parties to this treaty, that whenever the Indians shall be required to remove from the ceded district, all the unceded lands belonging to the Indians of Fond du Lac, Sandy Lake, and Mississippi bands, shall be the common property and home of all the Indians, party to this treaty.

ARTICLE IV.

In consideration of the foregoing cession, the United States, engage to pay to the Chippewa Indians of the Mississippi, and Lake Superior, annually, for twenty-five years, twelve thousand five hundred (12,500) dollars, in specie, ten thousand five hundred (10,500) dollars in goods, two thousand (2,000) dollars in provisions and tobacco, two thousand (2,000) dollars for the support of two blacksmiths shops, (including pay of smiths and assistants, and iron steel &c.) one thousand (1,000) dollars for pay of two farmers, twelve hundred (1,200) for pay of two carpenters, and two thousand (2,000) dollars for the support of schools for the Indians party to this treaty; and further the United States engage to pay the sum of five thousand (5,000) dollars as an agricultural fund, to be expended under the direction of the Secretary of War. And also the sum of seventy-five thousand (75,000) dollars, shall be allowed for the full satisfaction of their debts within the ceded district, which shall be examined by the commissioner to this treaty, and the amount to be allowed decided upon by him, which shall appear in a schedule hereunto annexed. The United States shall pay the amount so allowed within three years.

Whereas the Indians have expressed a strong desire to have some provision made for their half breed relatives, therefore it is agreed, that fifteen thousand (15,000) dollars shall be paid to said Indians, next year, as a present, to be disposed of, as they, together with their agent, shall determine in council.

ARTICLE V.

Whereas the whole country between Lake Superior and the Mississippi, has always been understood as belonging in common to the Chippewas, party to this treaty; and whereas the bands bordering on Lake Superior, have not been allowed to participate in the annuity payments of the treaty made with the Chippewas of the Mississippi, at St. Peters July 29th 1837, and whereas all the unceded lands belonging to the aforesaid Indians, are hereafter to be held in common, therefore, to remove all occasion for jealousy and discontent, it is agreed that all the annuity due by the said treaty, as also the annuity due by the present treaty, shall henceforth be equally divided among the Chippewas of the Mississippi and Lake Superior, party to this treaty, so that every person shall receive an equal share.

ARTICLE VI.

The Indians residing on the Mineral district, shall be subject to removal therefrom at the pleasure of the President of the United States.

ARTICLE VII.

This treaty shall be obligatory upon the contracting parties when ratified by the President and Senate of the United States.

In testimony whereof the said Robert Stuart commissioner, on the part of the United States, and the chiefs and headmen of the Chippewa Indians of the Mississippi and Lake Superior, have hereunto set their hands, at La Pointe of Lake Superior, Wisconsin Territory this fourth day of October in the year of our Lord one thousand eight hundred and forty-two.

Robert Stuart, Commissioner.
Jno. Hulbert, Secretary.

Crow wing River,	Po go ne gi shik,	1st chief.
Do	Son go com ick,	2d do.
Sandy Lake,	Ka non do ur uin zo,	1st do.
Do	Na tum e gaw bon,	2d do.
Gull Lake,	Ua bo jig,	1st do.
Do	Pay pe si gon de bay,	2d do.
Red Ceder Lake,	Kui ui sen shis,	1st do.
Do	Ott taw wance,	2d do.
Po ke gom maw,	Bai ie jig,	1st do.
Do.	Show ne aw,	2d do.
Wisconsin River,	Ki uen zi,	1st do.
Do.	Wi aw bis ke kut te way,	2d do.
Lac de Flambeau,	A pish ka go gi,	1st do.
Do.	May tock cus e quay,	2d do.
Do.	She maw gon e,	2d do.
Lake Bands,	Ki ji ua be she shi,	1st do.
Do.	Ke kon o tum,	2d do.
Fon du Lac,	Shin goob,	1st do.
Do.	Na gan nab,	2d do.
Do.	Mong o zet,	2d do.
La Pointe,	Gitchi waisky,	1st do.
Do.	Mi zi,	2d do.
Do.	Ta qua gone e,	2d do.
Onlonagan,	O kon di kan,	1st do.
Do	Kis ke taw wac,	2d do.
Ance,	Pe na shi,	1st do.
Do.	Guck we san sish,	2d do.
Vieux Desert,	Ka she osh e,	1st do.
Do.	Medge waw gwaw wot,	2d do.
Mille Lac,	Ne qua ne be,	1st do.
Do.	Ua shash ko kum,	2d do.
Do.	No din,	2d do.
St. Croix,	Be zhi ki,	1st do.
Do.	Ka bi na be,	2d do.
Do.	Ai aw bens,	2d do.
Snake River,	Sha go bi,	1st do.
Chippewa River,	Ua be she shi,	1st do.
	Que way zhan sis,	2d do.
Lac Courtulle,	Ne na nang eb,	1st do.
Do	Be bo kon uen,	2d do.
Do.	Ki uen zi,	2d do.

In presence of—

Henry Blanchford, interpreter.
Samuel Ashmun, interpreter.
Justin Rice.
Charles H. Oakes.
William A. Aitkin.
William Brewster.
Charles M. Borup.

Z. Platt.
C. H. Beaulieau.
L. T. Jamison.
James P. Scott.
Cyrus Mendenhall.
L. M. Warren.

(To the Indian names are subjoined marks.)

TREATY WITH THE CHIPPEWA OF SEPTEMBER 30, 1854

10 STAT. 1109

Articles of a treaty made and concluded at La Pointe, in the State of Wisconsin, between Henry C. Gilbert and David B. Herriman, commissioners on the part of the United States, and the Chippewa Indians of Lake Superior and the Mississippi, by their chiefs and head-men.

ARTICLE 1. The Chippewas of Lake Superior hereby cede to the United States all the lands heretofore owned by them in common with the Chippewas of the Mississippi, lying east of the following boundary-line, to wit: Beginning at a point, where the east branch of Snake River crosses the southern boundary-line of the Chippewa country, running thence up the said branch to its source, thence nearly north, in a straight line, to the mouth of East Savannah River, thence up the St. Louis River to the mouth of East Swan River, thence up the East Swan River to its source, thence in a straight line to the most westerly bend of Vermillion River, and thence down the Vermillion River to its mouth.

The Chippewas of the Mississippi hereby assent and agree to the foregoing cession, and consent that the whole amount of the consideration money for the country ceded above, shall be paid to the Chippewas of Lake Superior, and in consideration thereof the Chippewas of Lake Superior hereby relinquish to the Chippewas of the Mississippi, all their interest in and claim to the lands heretofore owned by them in common, lying west of the above boundry-line.

ARTICLE 2. The United States agree to set apart and withhold from sale, for the use of the Chippewas of Lake Superior, the following-described tracts of land, viz:

1st. For the L'Anse and Vieux De Sert bands, all the unsold lands in the following townships in the State of Michigan: Township fifty-one north range thirty-three west; township fifty-one north range thirty-two west; the east half of township fifty north range thirty-three west; the west half of township fifty north range thirty-two west, and all of township fifty-one north range thirty-one west, lying west of Huron Bay.

2d. For the La Pointe band, and such other Indians as may see fit to settle with them, a tract of land bounded as follows: Beginning on the south shore of Lake Superior, a few miles west of Montreal River, at the mouth of a creek called by the Indians Ke-che-se-be-we-she, running thence south to a line drawn east and west through the centre of township forty-seven north, thence west to the west line of said township, thence south to the south-east corner of township forty-six north, range thirty-two west, thence west the width of two townships, thence north the width of two townships, thence west one mile, thence north to the lake shore, and thence along the lake shore, crossing Shag-waw-me-quon Point, to the place of beginning. Also two hundred acres on the northern extremity of Madeline Island, for a fishing ground.

3d. For the other Wisconsin bands, a tract of land lying about Lac De Flambeau, and another tract on Lac Court Orielles, each equal in extent to three townships, the boundaries of which shall be hereafter agreed upon or fixed under the direction of the President.

4th. For the Fond Du Lac bands, a tract of land bounded as follows: Beginning at an island in the St. Louis River, above Knife Portage, called by the Indians Paw-paw-sco-me-me-tig, running thence west to the boundary-line heretofore described, thence north along said boundary-line to the mouth of Savannah River, thence down the St. Louis River to the place of beginning. And if said tract shall contain less than one hundred thousand acres, a strip of land shall be added on the south side thereof, large enough to equal such deficiency.

5th. For the Grand Portage band, a tract of land bounded as follows: Beginning at a rock a little east of the eastern extremity of Grand Portage Bay, running thence along the lake shore to the mouth of a small stream called by the Indians Maw-ske-gwaw-caw-maw-se-be, or Cranberry Marsh River, thence up said stream, across the point to Pigeon River, thence down Pigeon River to a point opposite the starting-point, and thence across to the place of beginning.

6th. The Ontonagon band and that subdivision of the La Pointe band of which Buffalo is chief, may each select, on or near the lake shore, four sections of land, under the direction of the President, the boundaries of which shall be defined hereafter. And being desirous to provide for some of his connections who have rendered his people important services, it is agreed that the chief Buffalo may select one section of land, at such place in the ceded territory as he may see fit, which shall be reserved for that purpose, and conveyed by the United States to such person or persons as he may direct.

7th. Each head of a family, or single person over twenty-one years of age at the present time of the mixed bloods, belonging to the Chippewas of Lake Superior, shall be entitled to eighty acres of land, to be selected by them under the direction of the President, and which shall be secured to them by patent in the usual form.

ARTICLE 3. The United States will define the boundaries of the reserved tracts, whenever it may be necessary, by actual survey, and the President may, from time to time, at his discretion, cause the whole to be surveyed, and may assign to each head of a family or single person over twenty-one years of age, eighty acres of land for his or their separate use; and he may, at his discretion, as fast as the occupants become capable of transacting their own affairs, issue patents therefor to such occupants, with such restrictions of the power of alienation as he may see fit to impose. And he may also, at his discretion, make rules and regulations, respecting the disposition of the lands in case of the death of the head of a family, or single person occupying the same, or in case of its abandonment by them. And he may also assign other lands in exchange for mineral lands, if any such are found in the tracts herein set apart. And he may also make such changes in the boundaries of such reserved tracts or otherwise, as shall be necessary to prevent interference with any vested rights. All necessary roads, highways, and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases.

ARTICLE 4. In consideration of and payment for the country hereby ceded, the United States agree to pay to the Chippewas of Lake Superior, annually, for the term of twenty years, the following sums to wit: five thousands dollars in coin; eight thousand dollars in goods, household furniture and cooking utensils; three thousand dollars in agricultural implements and cattle, carpenter's and other tools and building materials, and three thousand dollars for moral and educational purposes, of which last sum, three hundred dollars per annum shall be paid to the Grand Portage band, to enable them to maintain a school at their village. The United States will also pay the further sum of ninety thousand dollars, as the chiefs in open council may direct, to enable them to meet their present just engagements. Also the further sum of six thousand dollars, in agricultural implements, household furniture, and cooking utensils, to be distributed at the next annuity payment, among the mixed bloods of said nation. The United States will also furnish two hundred guns, one hundred rifles, five hundred beaver-traps, three hundred dollars' worth of ammunition, and one thousand dollars' worth of ready-made clothing, to be distributed among the young men of the nation, at the next annuity payment.

ARTICLE 5. The United States will also furnish a blacksmith and assistant, with the usual amount of stock, during the continuance of the annuity payments, and as much longer as the President may think proper, at each of the points herein set apart for the residence of the Indians, the same to be in lieu of all the employees to which the Chippewas of Lake Superior may be entitled under previous existing treaties.

ARTICLE 6. The annuities of the Indians shall not be taken to pay the debts of individuals, but satisfaction for depredations committed by them shall be made by them in such manner as the President may direct.

ARTICLE 7. No spirituous liquors shall be made, sold, or used on any of the lands herein set apart for the residence of the Indians, and the sale of the same shall be prohibited in the Territory hereby ceded, until otherwise ordered by the President.

ARTICLE 8. It is agreed, between the Chippewas of Lake Superior and the Chippewas of the Mississippi, that the former shall be entitled to two-thirds, and the latter to one-third, of all benefits to be derived from former treaties existing prior to the year 1847.

ARTICLE 9. The United States agree that an examination shall be made, and all sums that may be found equitably due to the Indians, for arrearages of annuity or other thing, under the provisions of former treaties, shall be paid as the chiefs may direct.

ARTICLE 10. All missionaries, and teachers, and other persons of full age, residing in the territory hereby ceded, or upon any of the reservations hereby made by authority of law, shall be allowed to enter the land occupied by them at the minimum price whenever the surveys shall be completed to the amount of one quarter-section each.

ARTICLE 11. All annuity payments to the Chippewas of Lake Superior, shall hereafter be made at L'Anse, La Pointe, Grand Portage, and on the St. Louis River; and the Indians shall not be required to remove from the homes hereby set apart for them. And such of them as reside in the territory hereby ceded, shall have the right to hunt and fish therein, until otherwise ordered by the President.

ARTICLE 12. In consideration of the poverty of the Bois Forte Indians who are parties to this treaty, they having never received any annuity payments, and of the great extent of that part of the ceded country owned exclusively by them, the following additional stipulations are made for their benefit. The United States will pay the sum of ten thousand dollars, as their chiefs in open council may direct, to enable them to meet their present just engagements. Also the further sum of ten thousand dollars, in five equal annual payments, in blankets, cloth, nets, guns, ammunition, and such other articles of necessity as they may require.

They shall have the right to select their reservation at any time hereafter, under the direction of the President; and the same may be equal in extent, in proportion to their numbers, to those allowed the other bands, and be subject to the same provisions.

They shall be allowed a blacksmith, and the usual smithshop supplies, and also two persons to instruct them in farming, whenever in the opinion of the President it shall be proper, and for such length of time as he shall direct.

It is understood that all Indians who are parties to this treaty, except the Chippewas of the Mississippi, shall hereafter be known as the Chippewas of Lake Superior. *Provided*, That the stipulation by which the Chippewas of Lake Superior relinquishing their right to land west of the boundary-line shall not apply to the Bois Forte band who are parties to this treaty.

ARTICLE 13. This treaty shall be obligatory on the contracting parties, as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Henry C. Gilbert, and the said David B. Herriman, commissioners as aforesaid, and the undersigned chiefs and headmen of the Chippewas of Lake Superior and the Mississippi, have hereunto set their hands and seals, at the place aforesaid, this thirtieth day of September, one thousand eight hundred and fifty-four.

Henry C. Gilbert,
David B. Herriman,
Commissioners.

Richard M. Smith, Secretary.

La Pointe Band:
Ke-che-waish-ke, or the Buffalo, 1st chief, his x mark. [L. S.]
Chay-che-que-oh, 2d chief, his x mark. [L. S.]
A-daw-we-ge-zhick, or Each Side of the sky, 2d chief, his x mark. [L. S.]
O-ske-naw-way, or the Youth, 2d chief, his x mark. [L. S.]
Maw-caw-day-pe-nay-se, or the Black Bird, 2d chief, his x mark. [L. S.]
Naw-waw-naw-quot, headman, his x mark. [L. S.]
Ke-wain-zeence, headman, his x mark. [L. S.]
Waw-baw-ne-me-ke, or the White Thunder, 2d chief, his x mark. [L. S.]
Pay-baw-me-say, or the Soarer, 2d chief, his x mark. [L. S.]
Naw-waw-ge-waw-nose, or the Little Current, 2d chief, his x mark. [L. S.]
Maw-caw-day-waw-quot, or the Black Cloud, 2d chief, his x mark. [L. S.]
Me-she-naw-way, or the Disciple, 2d chief, his x mark. [L. S.]
Key-me-waw-naw-um, headman, his x mark. [L. S.]
She-gog headman, his x mark. [L. S.]
Ontonagon Band:
O-cun-de-cun, or the Buoy, 1st chief, his x mark. [L. S.]
Waw-say-ge-zhick, or the Clear Sky, 2d chief, his x mark. [L. S.]
Keesh-ke-taw-wug, headman, his x mark. [L. S.]
L'Anse Band:
David King, 1st chief, his x mark. [L. S.]
John Southwind, headman, his x mark. [L. S.]
Peter Marksman, headman, his x mark. [L. S.]
Naw-taw-me-ge-zhick, or the First Sky, 2d chief, his x mark. [L. S.]
Aw-se-neece, headman, his x mark. [L. S.]
Vieux De Sert Band:
May-dway-aw-she, 1st chief, his x mark. [L. S.]
Posh-quay-gin, or the Leather, 2d chief, his x mark. [L. S.]
Grand Portage Band:
Shaw-gaw-naw-sheence, or the Little Englishman, 1st chief, his x mark. [L. S.]
May-mosh-caw-wosh, headman, his x mark. [L. S.]
Aw-de-konse, or the Little Reindeer, 2d chief, his x mark. [L. S.]
Way-we-ge-wam, headman, his x mark. [L. S.]
Fond Du Lac Band:
Shing-goope, or the Balsom, 1st chief, his x mark. [L. S.]
Mawn-go-sit, or the Loon's Foot, 2d chief, his x mark. [L. S.]
May-quaw-me-we-ge-zhick, headman, his x mark. [L. S.]
Keesh-kawk, headman, his x mark. [L. S.]
Caw-taw-waw-be-day, headman, his x mark. [L. S.]
O-saw-gee, headman, his x mark. [L. S.]
Ke-che-aw-ke-wain-ze, headman, his x mark. [L. S.]
Naw-gaw-nub, or the Foremost Sitter, 2d chief, his x mark. [L. S.]
Ain-ne-maw-sung, 2d chief, his x mark. [L. S.]
Naw-aw-bun-way, headman, his x mark. [L. S.]
Wain-ge-maw-tub, headman, his x mark. [L. S.]
Aw-ke-wain-zeence, headman, his x mark. [L. S.]
Shay-way-be-nay-se, headman, his x mark. [L. S.]
Paw-pe-oh, headman, his x mark. [L. S.]
Lac Court Oreille Band:
Aw-ke-wain-ze, or the Old Man, 1st chief, his x mark. [L. S.]
Key-no-zhance, or the Little Jack Fish, 1st chief, his x mark. [L. S.]
Key-che-pe-nay-se, or the Big Bird, 2d chief, his x mark. [L. S.]
Ke-che-waw-be-shay-she, or the Big Martin, 2d chief, his x mark. [L. S.]

Waw-be-shay-sheence, headman, his x mark. [L. S.]
Quay-quay-cub, headman, his x mark. [L. S.]
Shaw-waw-no-me-tay, headman, his x mark. [L. S.]
Nay-naw-ong-gay-be, or the Dressing Bird, 1st chief, his x mark. [L. S.]
O-zhaw-waw-sco-ge-zhick, or the Blue Sky, 2d chief, his x mark. [L. S.]
I-yaw-banse, or the Little Buck, 2d chief, his x mark. [L. S.]
Ke-che-e-nin-ne, headman, his x mark. [L. S.]
Haw-daw-gaw-me, headman, his x mark. [L. S.]
Way-me-te-go-she, headman, his x mark. [L. S.]
Pay-me-ge-wung, headman, his x mark. [L. S.]

Lac Du Flambeau Band:

Aw-mo-se, or the Wasp, 1st chief, his x mark. [L. S.]
Ke-nish-te-no, 2d chief, his x mark. [L. S.]
Me-gee-see, or the Eagle, 2d chief, his x mark. [L. S.]
Kay-kay-co-gwaw-nay-aw-she, headman, his x mark. [L. S.]
O-che-chog, headman, his x mark. [L. S.]
Nay-she-kay-gwaw-nay-be, headman, his x mark. [L. S.]
O-scaw-bay-wis, or the Waiter, 1st chief, his x mark. [L. S.]
Que-we-zance, or the White Fish, 2d chief, his x mark. [L. S.]
Ne-gig, or the Otter, 2d chief, his x mark. [L. S.]
Nay-waw-che-ge-ghick-may-be, headman, his x mark. [L. S.]
Quay-quay-ke-cah, headman, his x mark. [L. S.]

Bois Forte Band:

Kay-baish-caw-daw-way, or Clear Round the Prairie, 1st chief, his x mark. [L. S.]
Way-zaw-we-ge-zhick-way-sking, headman, his x mark. [L. S.]
O-saw-we-pe-nay-she, headman, his x mark. [L. S.]

The Mississippi Bands:

Que-we-san-se, or Hole in the Day, head chief, his x mark. [L. S.]
Caw-nawn-daw-waw-win-zo, or the Berry Hunter, 1st chief, his x mark. [L. S.]
Waw-bow-jieg, or the White Fisher, 2d chief, his x mark. [L. S.]
Ot-taw-waw, 2d chief, his x mark. [L. S.]
Que-we-zhan-cis, or the Bad Boy, 2d chief, his x mark. [L. S.]
Bye-a-jick, or the Lone Man, 2d chief, his x mark. [L. S.]
I-yaw-shaw-way-ge-zhick, or the Crossing Sky, 2d chief, his x mark. [L. S.]
Maw-caw-day, or the Bear's Heart, 2d chief, his x mark. [L. S.]
Ke-way-de-no-go-nay-be, or the Northern Feather, 2d chief, his x mark. [L. S.]
Me-squaw-dace, headman, his x mark. [L. S.]
Naw-gaw-ne-gaw-bo, headman, his x mark. [L. S.]
Wawm-be-de-yea, headman, his x mark. [L. S.]
Waish-key, headman, his x mark. [L. S.]
Caw-way-caw-me-ge-skung, headman, his x mark. [L. S.]
My-yaw-ge-way-we-dunk, or the One who carries the Voice, 2d chief, his x mark. [L. S.]

John F. Godfroy,
Geo. Johnston,
S. A. Marvin,
Louis Codot,
Paul H. Beaulieu,
Henry Blatchford,
Peter Floy,
Interpreters.

Executed in the presence of—

Henry M. Rice,
J. W. Lynde,
G. D. Williams,
B. H. Connor,
E. W. Muldough,
Richard Godfroy,
D. S. Cash,
H. H. McCullough,
E. Smith Lee,
Wm. E. Vantassel,
L. H. Wheeler.

ADDENDUM TO RULE 29.1 LIST

EXXON CORPORATION

Affiliates and Subsidiaries—Not Wholly Owned
(February 1994)

151742 Canada Inc.
165550 Canada Limited
172965 Canada Limited
177003 Canada Inc.
2849518 Canada Limited
571269 Alberta Limited
571270 Alberta Limited
AGA Progas a.s
AT&S Exploration Ltd.
Abu Dhabi Petroleum Company Limited
Ace Polymer Co., Ltd.
Acquifund Resources Limited
Aditivos Orinoco, C.A.
Adria-Wien Pipeline Gesellschaft mit beschrankter Haftung
Advanced Elastomer Systems Do Brasil Ltda.
Advanced Elastomer Systems Japan Limited
Advanced Elastomer Systems Limited
Advanced Elastomer Systems Marketing Pte. Ltd.
Advanced Elastomer Systems NV/SA
Advanced Elastomer Systems Singapore Pte. Ltd.
Advanced Elastomer Systems, Canada, Inc.
Advanced Elastomer Systems, Inc.
Advanced Elastomer Systems, L.P.
Air Tankdienst Koeln GbR
Aircraft Fuel Supply B. V.
Al-Jubail Petrochemical Company
Alberta Products Pipe Line Ltd.
Alyeska Pipeline Service Company

AquaAir Environmental, Inc.
Aramco Services Company
Asakawa Sekiyu K.K.
Awaji Gas Nenryo Kabushiki Kaisha
Azuma Sekiyu K.K.
B.W.O.C., Inc.
BEB Erdgas und Erdoel GmbH, Hannover
BRIGITTA Erdgas und Erdoel GmbH, Hannover
Bangkok Aviation Fuel Services Limited
Banshu Ekika Gas K.K.
Bayerische Erdoelleitung G.m.b.H.
Beaverhill Resources Limited
Brickwood Holdings Pty. Ltd.
Bryan Austin Chalk Operating Committee, Inc.
Bryan Woodbine Gathering, Inc.
Canadian Reserve Oil & Gas Ltd.
Cascade Fertilizers (1990) Limited
Castle Peak Power Company Limited
Changi Airport Fuel Hydrant Installation Pte. Ltd.
Changi Into-Plane Services (Pte) Ltd.
Chuo Sekiyu Hanbai K.K.
Clermont Coal Mines Limited
Comcor Chemicals Limited
Compagnie Industrielle des Polyethylenes de Normandie, GIE
Compania Minera Disputada de Las Condes S.A.
Comptoir Auxiliare du Petrole
Comptoir Oyonnaxien des Combustibles (C.O.C.)
Computer Centrum Groningen B.V.
Copim St. Lawrence Ltd.
Crandon Mining Company, a Wisconsin partnership
Cynthia Gas Gathering Company Limited
DFTG Deutsche Fluessigerdgas Terminal GmbH
Daihatsu Sekiyu K.K.
Daito Gas K.K.
Depot Petrolier du Gresivaudan

Depots Petroliers de la Corse
Depots de Petrole Cotiers
Deudan-Holding GmbH
Deutsche Advanced Elastomer Systems GmbH
Deutsche Erdgas Transport G.m.b.H.
Deutsche Transalpine Oelleitung G.m.b.H.
Devon Estates Limited
Dexco Polymers (General Partnership)
Disma S.r.l.
Dixie Pipeline Company
Dunbar Oil Ltd.
E S F Limited
ESSO OIL Tankstellen Gesellschaft m.b.H.
ETD Tankdienst Gesellschaft Duesseldorf GbR
Eagle Kenso K.K.
Eagle Reinsurance Co. Ltd.
East Texas Salt Water Disposal Company
Eiko Sekiyu K.K.
Elwerath Erdgas und Erdoel GmbH, Hannover
Elwerath Erdoel und Erdgas AG
Emirates National Chemicals Company Ltd.
Emori Sekiyu K.K.
Emsland-Erdoelleitung G.m.b.H.
Emulsions de Feyzin
Emulsions du Dauphine
Energie Marketing Service GmbH
Enterprise Housing Partners 1992 Limited Partnership
Entrepot Petrolier de Mulhouse (E.P.M.)
Entrepot Petrolier de l'Aveyron (E.P.A.)
Erdgas-Verkaufs-Gesellschaft m.b.H.
Erdoel-Raffinerie Deurag-Nerag GmbH
Esso (Overseas) Pension Trust Limited
Esso Energie G.I.E.
Esso Exploration and Production Angola Inc.
Esso Exploration and Production Ireland Limited
Esso Lub´ Services

Esso Malaysia Berhad
Esso Raffinage S.A.F.
Esso Resources Properties Inc.
Esso Societe Anonyme Francaise
Esso Standard Thailand Ltd.
Esso Standard Tunisie S. A.
Esso Technologies et Services (E.T.S.)
Etablissements Cloarec
Exxon Asset Funding Company
Exxon Asset Management Company
Exxon Chemical Asset Management Partnership
Exxon Chemical France
Exxon Chemical Paraffins Limited
Exxon Chemical Polymeres SNC
Exxon Mobile Bay Partnership
Exxon de Colombia S.A.
F.T. Giken Kabushiki Kaisha
Federated Pipe Lines Ltd.
Ferngas Nordbayern G.m.b.H.
Ferngas Salzgitter GmbH
Fernkaelte Geschaeftsstadt Nord G.b.R.
Flughafen Schwechat Hydranten-Gesellschaft
Fuji Kogyo K.K.
Full Cycle Plastics Pty. Ltd.
G16a (Groep) B.V.
Gasunie Engineering B.V.
Gasunie Warmte/Kracht Emmen B.V.
General Bussan K.K.
General Highway K.K.
General Petrochemical Industries Limited
General Sekiyu K.K.
General Sekiyu Okinawa Hanbai K.K.
General Sekiyu Overseas, Ltd.
General Shipping Co. Ltd.
General Unyu Kabushiki Kaisha

Geobutane - Lavera
Gewerkschaft Brassert Erdoel und Erdgas GmbH
Gewerkschaft Gute Hoffnung Erdgas und Erdoel GmbH
Gewerkschaft Kuechenberg Erdgas und Erdoel GmbH
Glen Park Gas Pipe Line Company Limited
Grande Ecaille Land Company, Inc.
Groupement Immobilier Petrolier
Groupement Petrolier Aviation
Groupement Petrolier de Nantes (G.P.N.)
Groupement Petrolier de Saint-Pierre des Corps (G.P.S.P.C.)
Groupement Petrolier de la Cote d'Azur
Groupement Petrolier du Finistere G.I.E.
Groupement Petrolier du Val-de-Marne (G.P.V.M.)
Groupement d'Exploitation du Depot de Reception de Chennevie
Guangzhou Esso Petroleum Service Company
Hambrecht & Quist Environmental Technology
Hamburger Gaswerke GmbH
Hannoversche Erdoelleitungs-G.m.b.H.
Hanshin Kyowa Sekiyu K.K.
Heinrich Schneider Spedition GmbH
Hiroshima General Gas Juten Kabushiki Kaisha
Hoei Sekiyu K.K.
Hokkai Sanshi Co., Ltd. (Chemical)
Hokushin Bussan K.K.
Hokuyu Sekiyu K.K.
Hong Kong Pumped Storage Development Company, Limited
Houston Regional Monitoring Corporation
Hydrant Refuelling System, S.A.
Hydranten-Betriebs-Gesellschaft, G.b.R.
Hydrierwerke Poelitz Aktiengesellschaft
Imperial Oil (an Ontario Partnership)
Imperial Oil Limited/
  Imperial Oil Resources Limited
Imperial Oil Resources N.W.T. Limited
Imperial Oil Resources Ventures Limited

Imperial Oil Resources an Alberta limited partnership
Imperial Pipe Line Company, Limited, The
Inada Ekka Gas Kabushiki Kaisha
Industria Acqua Siracusana S.p.A.
Industry Promotion Enterprises Limited
Intoplane Services Company Limited
Iranian Oil Participants Limited (Iranian Consortium)
Iranian Oil Services (Holdings) Limited
Iranian Oil Services Limited
Iraq Petroleum Company, Limited
Iraq Petroleum Pensions, Limited
Japan Butyl Company Limited
Japan Coal Liquefaction Development Company, Ltd.
Jaymo SNC
Jersey Nuclear-Avco Isotopes, Inc.
K. K. Momose Shiojiri Stand
K. K. Toresen
K.K. Aizu General
K.K. Auto
K.K. Daimaru
K.K. Eastern Gas Terminal
K.K. General Sekiyu Hanbaisho
K.K. Genet
K.K. Genetech
K.K. Heian Sekiyu
K.K. Kyoei Shosha
K.K. Marugo Izumasa Shoten
K.K. Marutaka Sekiyu
K.K. Momose Sekiyu
K.K. Saidaiji Gas
K.K. Standard Sekiyu Osaka Hatsubaisho
K.K. Toko
K.K. Uwano Sekiyu Shokai
K/S Statfjord Transport A/S & Co.
KX Industries, L.P.

Kabushiki Kaisha Sankyo Plastics
Kabushiki Kaisha Serubisu
Kai Tak Refuellers Company Limited
Kansai Chuo Sekiyu K.K.
Kanto Kygnus K.K.
Karlsruhe-Stuttgart Rohrleitung Gesellschaft mbH
Kawasaki Kygnus Sekiyu Hambai Kabushiki Kaisha
Keiyo Sekiyu Hanbai K.K.
Kemcor Australia Pty. Ltd.
Kemcor Elastomers Ltd.
Kemcor Olefins Ltd.
Kemcor Plastics Pty. Ltd.
Kenya Petroleum Refineries Limited
Kibo Sekiyu Hanbai K.K.
Kimura Sekiyu Kabushiki Kaisha
Kinwa Sekiyu K.K.
Kobe Standard Sekiyu K. K.
Korea Perchem Company Limited
Kosxon Chemical Company Limited
Kowa Sekiyu K.K.
Kowloon Electricity Supply Company Limited
Kumho E.P. Rubber Co., Ltd.
Kygnus Ekika Gas Kabushiki Kaisha
Kygnus Kosan Kabushiki Kaisha
Kygnus Marketing Service K.K.
Kygnus Sekiyu K. K.
Kygnus Sekiyu Seisei Kabushiki Kaisha
Kygnus Trading Kabushiki Kaisha
Kyushu Eagle K.K.
L-Net East K.K.
L-Net West K.K.
L12A (Groep) B.V.
L12B/L15B (Groep) B.V.
L14 (Groep) B.V.
L15A (Groep) B.V.

L2 (Groep) B.V.
L5a (Groep) B.V.
LEAG Aktiengesellschaft fuer luzernisches Erdoel
Les Docks des Petroles d'Ambes
Liants Routiers de la Vallee de la Loire (LRVL)
Liants Routiers du Gard (L.R.G.)
Lilac Sekiyu Kabushiki Kaisha
Lily Sekiyu K.K.
Lithcon Petroleum International (Bahamas) Inc.
Lithcon Petroleum Taiwan Inc.
Long Beach Oil Development Company
MEGAL FINCO
MEGAL GmbH
MESBIC Financial Corporation of Houston
Maasvlakte Olie Terminal N.V.
Magota Sekiyu K.K.
Mainline Pipelines Limited
Malaysian Energy Chemical & Services Sdn Bhd
Manchester Airport Storage and Hydrant Company Limited
McCann Plastics Inc. (Chemical)
McColl-Frontenac Inc.
McColl-Frontenac Petroleum Inc./Petroliere McColl-Frontenac
Meiji Sekiyu K.K.
Metro Fuel Co. Ltd.
Mikawa Bussan K.K.
Mitake Unyu K.K.
Mittelrheinische Erdgas Transport Gesellschaft mit beschrank
Mode Wheel Property Limited
Montreal Pipe Line Limited/Les Pipe-Lines Montreal Limitee
Mount Thorley Coal Loading Limited
Mr. Lube Canada Inc.
Multi Tank Card B.V.
Mytex Polymers (General Partnership)
N. V. Nederlandse Gasunie

NAM - K 14 B.V.
NAM - K 15 B.V.
NAM - K 7 B.V.
NAM - K17 B.V.
NAM/CLOMS - K 8/K 11 B.V.
NAM/CLOMS - L 13 B.V.
NAM/MOBIL M9a B.V.
NPC Services, Inc.
Nakabayashi Sekiyu K.K.
Nansei Oil Terminal K.K.
Nansei Sekiyu Kabushiki Kaisha
Nanseki Kaihatsu K.K.
Native Venture Capital Co. Ltd.
Near East Development Corporation
Nederlandse Aardolie Maatschappij B. V.
Neptune Bulk Terminals (Canada) Ltd.
New Cure, Inc.
Newcastle Coal Shippers Pty. Limited
Nichiei Kogyo Kabushiki Kaisha
Nichimo Oil (Bermuda) Co., Ltd.
Nikko Sangyo K.K.
Nippon Unicar K.K.
Nisku Products Pipe Line Company Limited
Nissei Sekiyu Kabushiki Kaisha
Nogat B.V.
Norddeutsche Erdgas-Aufbereitungs G.m.b.H.
Norddeutsche Mineraloelwerke Stettin G.m.b.H.
Norddeutsche Erdgas Transport Gesellschaft mit beschrankte
Noroxo
Northward Developments Ltd.
OSLO Alberta Limited
Office Prive d'Assurances et de Courtages
Oil Field Chemicals Company (Saudi Arabia) Ltd.
Oil Service Company of Iran (Private Company)

Oil Spill Response Limited
Oldenburgische Erdoel Gesellschaft m.b.H.
Oleoducto de Colombia S.A.
Oleoductos Canarios, S.A.
Osaka General Gas K.K.
Osaka Kygnus K.K.
P. T. Stanvac Indonesia
P.A.C. S.A.R.L. (Pinson-Allegret-Causse)
PIMEC Inc.
Pacesetter Enterprises Limited
Pars Investment Corporation
Paxon Polymer Company, L.P.
Peninsula Electric Power Company Limited
Petroleum Services (Middle East) Limited
Petrosvibri S.A.
Pier Atlantic Limited
Pipe Line Services, Inc.
Plantation Pipe Line Company
Port-Jerome Gaz (P.J. Gaz)
Portland Pipe Line Corporation
Primaeroel GmbH
Prince William Sound Oil Spill Response Corporation
Progas Limited
Projectbureau W/K B.V.
Quadrant Gas Limited
Raffinerie du Midi S.A.R.L.
Rainbow Pipe Line Company, Ltd.
Redwater Water Disposal Company Limited
Refineria Petrolera Acajutla, S. A.
Regulus Holding (Singapore) Pte. Ltd.
Rheingas Erdgasleitungs-Gesellschaft m.b.H.
Rotterdam Antwerpen Pijpleiding (Belgie) N.V.
Rotterdam-Antwerpen Pijpleiding (Nederland) N.V.
Rubiatec Sendirian Berhad
Ruhrgas Aktiengesellschaft

S.A. du Pipeline a Produits Petroliers sur Territoire Geneve
SEAG Aktiengesellschaft fuer schweizerisches Erdoel
SERAM S.p.A.
SOVEXOIL Oil Field
Saitama Sekiyu Hanbai K.K.
Sanyo Sekiyu K.K.
Saraco S. A.
Saudi Arabian Lube Additives Company Limited
Schubert KG
Seismic Industries A/S
Senboku Oil Kikoh K.K.
Senpoku Oil Service K.K.
Servacar Ltd.
Shehtah Drilling Limited
Shimoyama Sekiyu K.K.
Shin-Nihon Yukagaku Kogyo K. K.
Shinohara Oil K.K.
Sigel Corporation
Smiley Gas Conservation Limited
Sociedad Nacional de Oleoductos Ltda.
Sociedad de Inversiones de Aviacion
Societa Italiana per l'Oleodotto Transalpino S.p.A.
Societa per Azioni Raffineria Padana Olii Minerali-SARPOM
Societe "Geomines-Caen"
Societe Anonyme "Produits Lubrifiants de Madagascar"—PROLU
Societe Anonyme de Gestion de Stocks de Securite (SAGESS)
Societe Anonyme de la Raffinerie des Antilles
Societe Anonyme des Hydrocarbures
Societe Civile de Mustapha Algerie
Societe Civile de Participation pour la Destruction des Dech
Societe Esso de Recherches et d'Exploitation Petrolieres Ess
Societe Francaise EXXON CHEMICAL
Societe Havraise de Manutention de Produits Petroliers
Societe Ivoirienne d'Operations Petroliers S.A.

Societe Malgache de Raffinage
Societe Paris-Manche
Societe Paris-Niel
Societe Reunionnaise d'Entreposage
Societe d'Etude et d'Exploitation de la Raffinerie du Tchad
Societe d'Exploitation & de Developpement d'Operations Comme
Societe d'Exploitation des Garages Les Stations Tour Eiffel
Societe de Manutention de Carburants Aviation (S.M.C.A.)
Societe de Promotion et de Financement Touristique (CARTHAGO)
Societe de la Raffinerie d'Alger
Societe des Pipe-Lines de Strasbourg
Societe des Transports Petroliers par Pipe Line
Societe du Caoutchouc Butyl (SOCABU)
Societe du Pipe Line de la Raffinerie de Lorraine
Societe du Pipe-Line Mediterranee-Rhone
Societe du Pipeline Sud-Europeen
Socony-Standard-Vacuum Oil Company (Petroleum Maatschappij)
Southern Natural Gas Development Pty. Ltd.
Spintek Systems, L.P.
Standard Kaihatsu K.K.
Standard Kosan Kabushiki Kaisha
Standard Service K.K.
Stansted Fuelling Company Limited
Statfjord Transport A/S
Stockage Geologique de Gaz de Lavera
Sueddeutsche Erdgas Transport Gesellschaft mit beschrankter
Sun East (Dublin) Company, Ltd.
Sun East Company Ltd.
Superior Disk Corporation
Syncrude Canada Ltd.
Synergistics Industries (NJ) Inc.
Synergistics Industries (TX) Inc.
Synergistics Industries Limited

TAR-Tankanlage Ruemlang AG
TBN Tanklager-Betriebsgesellschaft Nuernberg mbH
TCA Plastics Inc.
TFS Turbo Fuel Services GmbH, Hamburg
TGF Tankdienst Gesellschaft Frankfurt G.b.R.
TGM Tankdienst-Gesellschaft Muenchen GbR
TIBA Speditions GmbH
TLS Tanklager Stuttgart GmbH
Taihei Bussan K.K.
Taisei Kogyo Sekiyu Hanbai K.K.
Taketsuru Yugyo K.K.
Tankanlage A.G., Mellingen
Tanklager Altishausen A.G.
Tanklager Taegerschen AG
Tanklager-Gesellschaft Tegel G.b.R.
Tanklagergesellschaft, Koeln-Bonn G.b.R.
Tecnica Quimica Petrolera, S.A. de C.V.
Terminal Petrolier de Bordeaux (T.P.B.)
Thai Aliphatics Company Limited
Thai C-Center Company Limited
Thai Petroleum Pipeline Co., Ltd.
Thyssengas G.m.b.H.
Tohpren Co., Ltd. (Chemical)
Tojo Gas K.K.
Toko Sekiyu K.K.
Tonen Chemical Nasu Co., Ltd.
Tonen Energy International Corp.
Tonen Energy and Marine (Singapore) Pte. Ltd.
Tonen Filare Co. Ltd.
Tonen Film Company Limited
Tonen Kabushiki Kaisha
Tonen Kagaku K.K.
Tonen Properties Inc.
Tonen Sogo Service Co., Ltd.
Tonen System Plaza Kabushiki Kaisha

Tonen System Service Kabushiki Kaisha
Tonen Tanker Kabushiki Kaisha
Tonen Tapyrus Company Limited
Tonen Technology K. K.
Tonex Company Limited
Towa Compounding Co., Ltd.
Towa Sekiyu K.K.
Toyo Gas K.K.
Toyoshina Film Company, Ltd.
Trans-Northern Pipelines Inc.
Transalpine Oelleitung in Oesterreich Gesellschaft m.b.H.
Transgaz Lavera
Tsurumaru Unyu K.K.
Turkish Petroleum Company, Limited
UBAG - Unterflurbetankungsanlage Flughafen Zurich
Ulan Coal Mines Limited
United Industry Development Co., Ltd.
Van Salt Water Disposal Company
Verbundnetz Gas AG
Wako Jushi Kabushiki Kaisha
Warmtepomp Nederland B.V.
Westdeutsche Erdoelleitungs-G.m.b.H.
Westgas G.m.b.H.
Winnipeg Pipe Line Company Limited
Woodbine Marketing Co., Inc.
Worex S.N.C.
Yasaka Sekiyu K.K.
Yellowstone Pipe Line Company
Yoshimi Gas Kabushiki Kaisha
Yuai Sekiyu K.K.
Zenon Environmental Systems Inc. (ZESI)